STAFFORD COUNTY BOARD OF ZONING APPEALS MINUTES
June 25, 2013

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) on Tuesday, June 25, 2013, was called to order with the determination of a quorum at 7:00 p.m. by Chairman Dean Larson in the Board of Supervisors Chambers of the George L. Gordon, Jr., Government Center.

Members Present: Dean Larson, Steven Apicella, Robert Grimes, Ernest Ackermann, Larry Ingalls, Ray Davis, and Gregory Poss

Members Absent: Danny Kim and Heather Stefl

Staff Present: Kathy Baker
Evelyn Keith
Stacie Stinnette
Steve Hubble
James Staranowicz

CALL TO ORDER BY CHAIRMAN

DETERMINATION OF QUORUM

Dr. Larson: Good evening ladies and gentlemen and welcome to this meeting of the Stafford County Board of Zoning Appeals. The BZA is a quasi-judicial body that is appointed by the Circuit Court of Stafford County. The purpose of the BZA is to hear and decide appeals from any order, requirement, decision or determination made by the Zoning Administrator; to hear and decide upon requests for Variance from the Zoning Ordinance, when a literal enforcement of the ordinance would result in unnecessary hardship to the owners of a property; to hear and decide on requests for Special Exceptions where the zoning ordinance allows for Special Exceptions. The Board consists of seven regular members and two alternate members. An alternate member may be called upon to participate when a regular member is unable to hear a case. Let the record reflect that tonight we have a quorum with Dr. Ernest Ackerman to my left and Mr. Robert Grimes to my left, and then to my right Mr. Steve Apicella, Mr. Larry Ingalls, Mr. Ray Davis, and Mr. Greg Poss. The County staff tonight is represented by Ms. Evelyn Keith, our Zoning Technician, Mrs. Stacie Stinnette, Senior Admin Associate for Zoning and Admin, and Ms. Kathy Baker, Assistant Director of Planning and Zoning. The hearings will be conducted in the following order: the Chair will ask the staff to read the case and members of the Board may ask questions of the staff. The Chair shall ask the applicant or their representative to come forward and state their name and address and present their case to the Board. The presentation shall not exceed 10 minutes unless additional time is granted by the Board. Members of the Board may ask questions of the applicant to clarify or better understand the case. The Chair will then ask for any member of the public who wishes to speak in support of the application to come forward and speak. There shall be a 3 minute time limit for each individual speaker and a 5 minute time limit for a speaker who represents a group. After hearing from those in favor of the application, the Chair will ask for any member of the public who wishes to speak in opposition to the application to come forward and speak. After all public comments have been received the applicant shall have 3 minutes to respond. We ask that each speaker present their views directly to the Board and not to the applicant or other members of the public. After the applicant's final response the Chair shall close the public hearing. After the hearing has been closed there shall be no further public comments. The Board shall review the evidence presented and the Chair shall seek a motion. After discussion of the motion the Chair shall call for a vote. In order for any motion to be approved, 4 members of the Board must vote for approval. You'll see tonight that you have 7 members of the Board and that's basically as good as it gets; however, you may withdraw your application at any time

prior to a vote to approve or deny the application provided that you have not withdrawn a substantially same application within the previous 12 months. Any person or persons who do not agree with the decision of this Board shall have 30 days to petition the Stafford County Circuit Court to review our decision. Also, be aware that the Board will not hear any denied application for a variance or special exception that is substantially the same request for at least 1 year from the date of our decision. Now I ask that anyone who has a cell phone, pager, or other electronic device, please turn it off. Do not place it on vibrate as this interferes with our electronic equipment. Thank you. It is the custom of this Board to require any person who wishes to speak before the Board shall be administered an oath. Therefore I ask that anyone who wishes to speak tonight, stand and raise your right hand. Do you hereby swear or affirm that all testimony before this Board tonight shall be nothing but the truth?

(From the audience): I do.

Dr. Larson: Please be seated. The Chair asks that when you come down to the podium to speak, please give your name and address clearly into the microphone so that our recording secretary can have an accurate record of the speakers. Also, please sign the form on the table at the rear of the room. Thank you. Are there any additions or changes to the advertised agenda?

Ms. Keith: Mr. Chair, no changes.

Dr. Larson: Thank you. Before we hear the first case, does any Board member wish to make any declaration or statement concerning any of the cases to be heard before this Board tonight?

DECLARATIONS OF DISQUALIFICATIONS

Mr. Ingalls: Mr. Chairman, on case A13-03/1300225 concerning the Theatre Square, LLC, Mr. Larry Shier is evidently an owner in that company. Mr. Shier was a client of mine when I was working with Sullivan, Donahoe & Ingalls and even before I was retired and therefore I'm going to abstain from voting.

Dr. Larson: Thank you Mr. Ingalls. Any others?

Mr. Davis: In a previous life I worked with Debrarae Karnes and that was several years ago and I think that I'm able to participate fairly and honestly in all cases.

Dr. Larson: Thank you. Any others? Alright, so with regard the third case, let me be a little clearer. You must have 4 affirmative votes to approve an application. For the third case we'll have 6 people voting. If you do not think there are enough members present tonight that will enable you to receive a fair hearing, then you have the right to withdraw or defer the hearing until another meeting. However, you may withdraw or defer the hearing only once in any 12 month period. Now I'll ask staff to read the first case.

PUBLIC HEARINGS

1. A13-01/1300088 - Leming & Healy, P.C. for Ronald L. & Elvira Woltz - Appeal of a Notice of Violation dated December 18, 2012 regarding Section 28-62(f)(1)(a)1, "Development Conditions", Section 28-62(g)(1)h and Sec. 28-62(g)(2)f.1., Critical Resource Protection Area Buffer Requirement, for unpermitted land development in the Critical Resource Protection Area (CRPA) on Tax Map 41C Parcel 7. The property is zoned A-1, Agricultural, located at 99 Canterbury Drive, Canterbury Estates Subdivision.

Ms. Keith: Thank you. Mr. Chair, tonight you have Steve Hubble, Assistant Director of Public Works, and James Staranowicz, Environmental Zoning Technician, to answer any questions you may have in regards to this case as well as item number 2. First case, the attachments you have: application/owner's consent form, house location survey dated 4/16/97, copies of references listed in staff report, copy of violation dated 12/18/12. Staff's response to appeal: the sidewalk/patio/observation platform is a passive recreation facility, which is exempt from the Chesapeake Bay Overlay District. The structure in question (a sidewalk and patio/observation platform with overhead roof) is exempt from the Chesapeake Bay Overlay District requirements in accordance with Section 28-62(k)(4)b, which exempts passive recreation facilities, such as boardwalks, trails, and pathways. The sidewalk is the homeowners' only path to the water; the patio/observation deck serves the same purpose as a beach boardwalk, facilitating passive enjoyment of the views and sounds of the water. The covered patio and sidewalk combined is approximately 700 square feet and was sized to be minimally intrusive. The edge of the patio (located closest to the water) is located approximately 28 feet from the high water mark. As the structure is exempt from the Chesapeake Bay Overlay District, issuance of the Violation is erroneous.

Dr. Larson: If I may interrupt just for a second, Ms. Keith, what you have just read was, if I interpret this correctly, is the response… the applicant's response to the staff denial.

Ms. Keith: That is correct.

Dr. Larson: Okay, if you could say prior to their response, say this is their response and then, when you read the staff's response, if you could say this is the staff's response that would help clarify for the record what you're reading.

Ms. Keith: Okay, thank you. This is staff's response: The structures, a walkway and gazebo, are not exempt from Stafford County Code, Section 28-62, Chesapeake Bay Preservation Area Overlay District, and should not be considered a passive recreation facility. In accordance with the Riparian Buffers Modification and Mitigation Guidance Manual "passive recreation does not include…Structures such as pools, decks or gazebos…". Together the walkway and gazebo total approximately 700 square feet of impervious ground cover. In accordance with The Riparian Buffers Modification and Mitigation Guidance Manual, "Recreational facilities that involve excessive land clearing, disturbance of vegetation, or large expanses of impervious ground cover are not considered passive and should not qualify for an exempt." Number 2. This is the applicant's response: The sidewalk/patio/observation platform is a water dependent facility. The structure in question qualifies as a water dependent facility, which is a by-right use within the RPA (Section 9VAC10-20-130 and Stafford County Code 28-62(f)(1)). A water dependent facility is defined as "facilities that are by their very nature require that they be located adjacent (emphasis added) to the water…include the water dependent portions of marinas, aquacultural facilities that require fresh flows of water, beaches, docks, and piers…" Mr. and Mrs. Woltz use the structure to pursue a passionate bird watching hobby, using it daily in the early morning. The structure was built in stages; the sidewalk and the 425 square feet brick patio/observation platform was installed in 1998. During the past 3 years, the homeowners installed a covered roof (with supporting columns) over the original footprint of the patio/observation platform. The covered patio and sidewalk combined are approximately 700 square feet and was sized to be minimally intrusive. The edge of the patio (located closest to the water) is located approximately 28 feet from the high water mark. The covered roof and supporting columns serve to obscure the presence of the bird watchers, who regularly watch and document the presence of many water birds, including eagles, swans, great blue herons, and egrets. The structure has hosted participants from in the yearly bird count operated by the Audubon Society over the past ten years. The very nature of bird watching of water birds requires a location adjacent to the water, and therefore the structure is properly defined as a water dependent facility. The issuance of the Violation

is erroneous. And this is staff's response: The Stafford County Code, Sec. 28-25, and the Chesapeake Bay Preservation Area Designation and Management Regulation 4VAC50-90-40 (formerly 9VAC10-20-40) defines a water-dependent facility as "A development of land that cannot exist outside of the Critical Resource Protection Area (CRPA)." The Stafford County Zoning Ordinance (Section 28-25) defines a water dependent facility as "A development of land that cannot exist outside of the critical resource protection area and must be located on the shoreline by reason of the intrinsic nature of its operation. These facilities include, but are not limited to: ports; the intake and outfall structures of power plants, water treatment plants, wastewater treatment plants, and storm sewers; marinas and other boat docking structures; beaches and other public water-oriented recreation areas; and fisheries or other marine resource facilities." Although bird watching is considered a passive recreational activity, it is possible to conduct this activity from outside the CRPA and, therefore, the gazebo and walkway should not qualify for an exemption as a water dependent facility. That's all Mr. Chair.

Dr. Larson: Thank you. I actually have a question for staff to lead off with. On the notice of violation the first paragraph says "Land development in Critical Resource Protection Areas may be allowed only when permitted by the Administrator and if it is water dependent". I want to confirm that there is an "AND" there. Is that correct, that both requirements must be met?

Mr. Hubble: Just one second Mr. Chairman. I'll try to answer that question for you. Yes, that text is verbatim from the ordinance and there is an "AND."

Dr. Larson: Okay, thank you. Are there any other questions for staff?

Mr. Ingalls: Yes, may I ask a question Mr. Hubble? Mr. Hubble, is this lot, do you remember, is it prior to the October 1, 1989, non-conforming?

Mr. Hubble: I'm not 100% positive, but I'm 99% positive that it is.

Mr. Ingalls: That it is?

Mr. Hubble: Yes.

Mr. Ingalls: If that were the case, could they have built this gazebo within the land with 50 feet for the non-conforming lot status or is that non-conforming being able to build within the land only for principal structures? I read it the other day, principal structures and utilities; I can't remember the exact wording. So, could the gazebo have been built by administrative… ?

Mr. Hubble: No, not in this instance. If you look at the Code, the applicable section is 26-62(g)(2)(f)(2). And essentially what that says is that if you have a pre-Chesapeake Bay Act, basically a pre-1990 lot, in Stafford County and it does not have a principal structure on it, you would essentially be allowed to reduce the width of the buffer from 100 feet to 50 feet to allow yourself room for that principal structure and necessary utilities. There are no provisions under that section to allow accessory structures which is essentially why we're here this evening.

Mr. Ingalls: Okay, thank you.

Dr. Larson: And if I may, I think I saw somewhere in the evidence that the parcel was recorded in 1980, so that may answer your question. Are there any other questions for staff?

Dr. Ackermann: Do we know what the distance is from the house to the gazebo?

Mr. Hubble: I'm going to let James… he can handle some of the more site specific questions.

Mr. Staranowicz: No Sir, we do not know the distance from the house to the gazebo. We never took that measurement.

Mr. Ingalls: I'm sorry, any sort of estimate? Fifty feet? One hundred feet?

Mr. Staranowicz: It would probably be 100 to125 feet or so.

Mr. Ingalls: Thank you. Are there guidelines on how to make pathways in these areas?

Mr. Hubble: Yes Sir. In our response we made reference a couple of times to a riparian buffer modification and mitigation manual. That's basically a state guidance document that helps us deal with these type of issues and just on my familiarity with the document, I don't use it regularly, but it does have those type of details or suggestions in there for those type of things.

Dr. Larson: Is a brick walkway permitted?

Mr. Hubble: Typically not. Generally they would be looking for impervious surfaces like mulch, the natural ground. If you're on an area that's steep or has potential for erosion, they allow you to go to a hard surface such as stone. In this instance the land is basically flat there from my experience with this site, so I don't believe that a hardened surface would be warranted.

Dr. Larson: Thank you. Any other questions for staff?

Dr. Ackermann: In our packages were several documents, aside from the staff response to the appeal, riparian buffers guidance manual, a DCR RPA permitted development activities guidance and several state code sections. Is that correct?

Mr. Hubble: Yes, that's correct.

Dr. Ackermann: So you're basing, when I say you, the County, is basing its response in part due to these documents as well as its experience?

Mr. Hubble: It would essentially be based on the requirements of the County Ordinance which are backed up by the State Code and Guidance and then essentially how we dealt with these situations in the past.

Dr. Ackermann: Okay. Even where a person who wanted to construct something that is permissible, from what I read, they would still have to do several, well, they would still have to seek a local review and do a water quality study?

Mr. Hubble: Yes. Generally for us to permit activities within the Resource Protection Area they have to be supported by what's called a water quality impact assessment and the details of which are laid out in the Ordinance.

Dr. Ackermann: Did that happen in this case?

Mr. Hubble: It happened after the fact. They provided the document as supporting information either for their building permit or for their variance application.

Dr. Ackermann: But again, that is supposed to happen before you construct anything that would impact the RPA.

Mr. Hubble: Yes sir.

Dr. Ackermann: Were they required to fulfill any other requirements that were not met? Did they need to get a permit for the gazebo or the walkway?

Mr. Hubble: I believe they need to complete the building permit process for the gazebo. Essentially it's stalled, waiting for this issue to be resolved.

Dr. Ackermann: But it was partially constructed prior to a permit being issued?

Mr. Hubble: Let me let James answer that question, just so we're on the right track.

Mr. Staranowicz: It was totally constructed prior to them applying for the building permit.

Dr. Ackermann: Okay. Again, just based on the information that was provided, I'm just asking some follow up questions, I think they're covered in the response but I just want to be clear. Do you consider the brick walkway to be impervious?

Mr. Staranowicz: Yes sir.

Dr. Ackermann: Okay. And the requirement is that any kind of walkway be pervious?

Mr. Staranowicz: Within the Resource Protection Area, yes sir.

Dr. Ackermann: Would you consider the gazebo or the pathway to be a water dependent facility or redevelopment?

Mr. Staranowicz: No sir, I wouldn't.

Dr. Ackermann: Okay. Do you think any of the exceptions that were noted in the documentation that you provided apply in this case?

Mr. Staranowicz: No sir.

Dr. Ackermann: Okay. And lastly, do you thing the applicant could engage in bird watching in the absence of this gazebo and walkway?

Mr. Staranowicz: Yes sir, I do. There is plenty of cleared areas within the property there that they could see the water without being that close to it.

Dr. Ackermann: Okay, thank you.

Dr. Larson: Any other questions for staff?

Dr. Ackermann: What is the topography of the land?

Mr. Staranowicz: There is a slight slope but it's not that great of a slope that it would require a hardened surface.

Dr. Larson: Any other questions for staff? Okay, hearing none, we'll open the public hearing. Will the applicant or his representative please come forward to present their case?

Mr. Leming: Thank you Mr. Chairman and good evening members of the Board of Zoning Appeals. My name is Clark Leming. I'm here on behalf of the applicant. As was the case a couple of month ago, I had a matter of the garage that collapsed. What we do procedurally in these cases is two things. First we have a notice of violation that is running. It becomes final after 30 days, so that was appealed immediately. We also filed a variance application. That took more time in this particular instance, because we did have to conduct a water quality impact assessment in support of that. The engineer that conducted that assessment is here this evening and I'm going to ask him to share the results of that with you. And I do have this question, Mr. Chairman. I think that the water quality impact assessment is relevant to both of these applications and hearings, because it does address the issue of the impact of the gazebo on the property and the RPA. So I'm going to ask him to do that in the context of this hearing and it would be relevant to the next hearing as well. My question is, whether or not we're having to be concerned about particular time limitation here, how much time that I have, I imagine it's probably going to take Mr. Reese about 4 to 5 minutes to talk about the water quality impact assessment which is relevant to both of the hearings. So, procedurally I'd appreciate some guidance on how the Board would like to handle that.

Dr. Larson: Yes, we will not deduct the time given for the water quality assurance from your time.

Mr. Leming: Okay and what is my time?

Dr. Larson: Your time is 10 minutes.

Mr. Leming: I know you're going to ask questions and things.

Dr. Larson: Your time is 10 minutes unless you need more and then we'll consider that.

Mr. Leming: Okay, well let's talk about the appeal at this point. Some background that is also, I think, relevant to both of these applications. You're correct that the lot was platted in 1980, so we are pre-Chesapeake Bay. The Woltzs purchased the property in 1983. On the plat at time of course there was no indication of the RPA, because that didn't exist at that particular time. I say that, because I'm going to share with you some results of some other BZAs in other jurisdictions and a Maryland opinion on the issue of gazebos within the RPA under Chesapeake Bay regulations and I think that's relevant. The walkway and the patio were installed over a period of time but completed in approximately in 1998. It is constructed of brick. We do take issue with the matter of imperviousness simply because the guidelines do point specifically to boardwalks. Boardwalks, at least as we understand them, are plank on plank while there may be some distance in between the planks they are certainly impervious then a ground would be. The bricks, as Mr. Reese will indicate, do have a certain degree of perviousness as well. The patio and the walkway were thus constructed and completed in about 1998. Prior to that time, in 1991, the Woltzs obtained a permit from the County to clear and grub the area that was within the RPA, the entire area. So what you have is a grass frontage. There is no vegetation. There was no vegetation that was removed at the time that either the walkway or the patio or ultimately the covering of the patio, the gazebo was installed. This is simply a grass surface. We did learn in the context of the engineering work that the

gazebo is about 39 feet from the high water mark, rather than the amount we had previously indicated, which was Mr. Woltz's estimate and therefore somewhat less off the walkways within the RPA we estimate that it's actually about 425 square feet for the patio and the gazebo covering at about 225 feet within the RPA for the walkway. Now the issues in this case, you have already asked a number of questions about, we understand what the County's position is on that. There are two matters that we have raised. One is whether or not this is an exempt activity and the definition of exempt, the statutory definition is actually quite broad and goes to whether or not the activities, the facilities are passive. In nature passive recreation is one thing that is permitted and the Code section specifically indicates such as boardwalks, trails and pathways. Boardwalks, again, we would maintain as something other than imperviousness and also point to the guidance that is provided by the state, specifically riparian buffers guidance manual. The thing that's underlying all of this for the Woltzs is that they are passionate bird watchers. And they are not just bird watchers in general. They are water bird watchers. This is a daily activity for them. The walkway and the patio and ultimately the gazebo was constructed specifically for the purpose of these observations and as we indicated, even the Audubon Society uses this. The gazebo, the covering provides some shelter, some degree of obscurity so that the birds can be observed, but it is specifically water birds that the Woltzs are watching here. Within the riparian buffers guidance manual, if you look at specifically page 74, which in your report is page 1 of 19, the chart at the top specifically does reference wild life watching, which is what it is that the Waltzs are doing. "Pathways, trails and boardwalks" to accomplish that "Citizens will use public open space whether or not facilities to accommodate public use. Paths will be made toward a favorite fishing hole or bird watching post" and that is what Mr. Waltz certainly believed he was doing, was constructing a path to his bird watching area. The other portion of the guidance manual that I think is relevant appears at the bottom of that page "Paths and trails for passive recreation are exempt from the development criteria for RPAs, but they should be designed to minimize the disturbance to the vegetation, groundcover, and soils". As you'll hear from our engineer, that didn't occur. There was no disturbance to the vegetation or ground cover, because there wasn't any specifically at the time the gazebo was built and even prior to that point in time, because of the clearing that was already done. There are a number of conclusions that appear on the next page of the materials that were presented to you. This is page 2 of 19. The once I would draw your attention to specifically, are those covering the 2,500 square feet of disturbance that triggers erosion and sediment control ordinance. Obviously nothing was done along those lines. The other ground that we have raised is the possibility of this being a water dependent activity. And I concede to you that under the state definition, that the only reference to recreation in that definition, does turn on public recreation and obviously this is private recreation, but I did want to share with you an opinion that comes from not the Virginia Attorney General, we haven't found anything like that, but the Maryland Attorney General that specifically suggests that gazebos are structures that should be permitted within the RPA on a case by case basis, depending on the nature of the gazebo. The upshot of this opinion is not that… of course Maryland is governed by Chesapeake Bay also… all gazebos should be permitted, but it's something that should be decided on on a case by case basis. The purpose is for a regulatory exception. I believe that… what I'd like to do at this point is to have Mr. Reese talk to you about the water quality impact assessment, because as I indicated, I think that that's relevant to both of these applications. So if I may do that?

Dr. Larson: Questions for Mr. Leming so far?

Dr. Ackermann: On page 74, the riparian buffers guidance manual, you say at the top it says wildlife viewing is passive, but it also says in the table "passive recreation does not include gazebos". You agree to that?

Mr. Leming: Yes. I see it. And I would point out, that in that regard that this is guidance. These are not the Chesapeake Bay regulations, this is just guidance. This is an interpretation of the regulations.

Dr. Ackermann: By the Virginia Department of Conservation and Recreation.

Mr. Leming: Correct.

Dr. Ackermann: Thank you.

Mr. Reese: Mr. Chairman, members of the Board, my name is Bruce Reese. I'm a registered, licensed engineer in the Commonwealth of Virginia. I work for The Engineering Groupe. We have offices in Fredericksburg and Woodbridge and I'm here to talk about the major water quality impact assessment that we performed as part of this process. You have this in your package. And I promise that I'm not going to go through every page of that, but I do think it's important that we have a little bit of background information on how we got to this point with Chesapeake Bay. Virginia legislature passed the Chesapeake Bay preservation ordinance in 1988 with the noble and justified goal to protect the bay from pollutants. Specifically, non-point source pollutants. The difference between the non-point and the point source is, the point source comes from a sewage treatment plant or power plant or a very specific discharge. The non-point comes from everything and it includes sediments, nutrients such as phosphor and nitrogen, toxic substances which are chemicals, gasoline, pathogens, bacteria. The idea was "Let's see what we can do to try prevent those materials from making their way to the Bay and let's start cleaning the Bay up". One way to accomplish this was to place a buffer between certain waters of the Commonwealth and the source of those pollutants. It was determined that a 100 foot buffer that was up against titled Wetlands, non-titled Wetlands that are continuous and connected to titled Wetlands, titled shores and the 100 foot buffer would constitute what was called a resource protection area. Stafford County calls it a critical resource protection area, but it's known as an RPA. The idea was, this particular strip of land was to reduce the pollutants by 40% and the sediment by 75%. What pollutants was it going to reduce? Rather the go through and analyze every one of them, they picked phosphor. That's what they call the keystone pollutant and test have shown that if you control the phosphors you also control the other types of pollutants, the heavy metals, the bacteria, all of the other types of pollutants and so it became known as the keystone pollutant. Now that's changing a little bit and new ordinances are coming about, but generally that's still staying constant; 40% reduction in phosphor, 75% reduction in sediment. The County also has what's known as a critical resource management area and that is areas that include floodplains, highly erodible soils, steep slopes or highly permeable soils. It should be noted that this property doesn't have any of those things other than the flood plain. The flood plain is within the RPA. Statewide they had to set a level by which they thought was appropriate for pollutants to get to the Bay. You can't stop all the pollutants and so what they picked was .45 pounds per acre per year of phosphorus (inaudible) and that assumed about a 16% imperviousness throughout the Commonwealth. So anything below that level, in theory, is cleaning the Bay. Any piece of property that contributes less than those thresh holding amounts is in fact providing a best management practice, a BMP. And with that, I'm going to talk specifically about our analysis and I'm going to really turn you attention to page 8 of the major water quality impact assessment, where we analyzed the pre- and the post-development phosphorus loading for this particular piece of property. What you see is that, the addition of the small amount of impervious area associated with the walkway and the gazebo did not have an impact on the phosphorus loading for the site. What we used was a method that is prescribed by the state, which is the simple method. It's probably not quite as simple as you would like it to be, but it includes such things as rainfall amount, percent of the rainfall that produces a runoff event, runoff coefficients, mean concentration of pollutants and in this case it's about .28 milligrams per liter. All that's taken into account for the formula and we ran this formula through on both, the pre-development and the post-development. The only thing

that changed was the amount of imperviousness and that amounted to such a small amount that it doesn't show up to two decimal places in our analysis which is as far as we're supposed to calculate. But an interesting part about this is, you'll notice that our pre-imposed is .35 pounds per acre per year which is less than the thrash hold that was set by the state at .45 pounds per acre per year as not contributing pollution to the Bay. So this property, if left alone as is, is in fact a BMP by itself. So in our analysis the addition of the walkway and gazebo did not have an impact on the Bay and no mitigation is necessary in order to provide the additional pollutant that would normally be associated with an intrusion into an RPA. The goal is to, and we don't want to lose sight of this, reduce pollutants into the Bay. This property does that on its own without anything else having to be done. The little intrusion into the RPA did not contribute to additional pollution for the Bay. That's, I think, the important thing to keep sight of is that there is not any additional pollution into the Bay. From that standpoint, I know staff had recommended some additional plantings, it's our opinion that that's not necessary. The site's already reducing pollutants going into the Bay and with that I'll be happy to answer any questions.

Dr. Larson: Mr. Reese, I have a question for you. In your water quality calculation, what sort of error bar can you sign to these numbers? Do you have a percentage or do you have any idea what's your systematic or other errors might be?

Mr. Reese: Literally these formulas are derived empirically. There is not a scientific method where you can go out and say "if you do this, you're going to get a reduction in pollution." What they do is, they take multiple landforms at different slopes, test the pollutants at the top of that landform and the pollutants at the bottom of that landform. And they do that over enough landforms that they can create a data set that's then used. What the variation is from the norm, I could not tell you, but I know that there is a wide variation in potential results.

Dr. Larson: Right, so when you test the pollutants at the two locations you suggested, there should be some sort of error in the measurement.

Mr. Reese: Absolutely. The increase here would be below whatever that error difference would be.

Dr. Larson: Right. So do you have an idea what that error might be in the measurements?

Mr. Reese: It would be a guess, but it would not surprise me if there's not a 10% error factor, just because of the empirical nature of the data.

Dr. Larson: Thank you. Any other questions?

Mr. Apicella: So what do we mean by pre-development and post-development? What do those terms mean?

Mr. Reese: Pre-development would be before the walkway and the gazebo had been constructed, post-development would be after the walkway and the gazebo were constructed.

Mr. Apicella: So a water study was done before they were constructed?

Mr. Reese: No, we can analyze it as if, because the landform didn't change from 1998 till now. The type of material out there, the ground hasn't changed, there's been no trees taken down, vegetation stayed the same. All that's changed is the addition of approximately 700 square feet of brick sidewalk and a gazebo.

And so we can go back and calculate what the runoff would have been prior to that being constructed and the runoff post that construction.

Mr. Apicella: So pre-development is a model that you construct based on what exists now.

Mr. Reese: The post-construction is what exists.

Mr. Apicella: So for the pre-development figures you have to hypothesize what it would be if it wasn't there or do you have to…how do you do that? Just seems curious to me.

Mr. Reese: Again, if the landforms hadn't changed, and those are part of the calculations the only thing that's changed, is the amount of imperviousness. So everything stays the same in the calculations other than approximately 650 square feet of additional impervious area on the site that already only got 10% imperviousness. That's how you're at .35 pounds of phosphorus rather than the state average of .45 pounds of phosphorus. You've got less imperviousness on this site than what the state assumed it would have statewide. We added approximately 650 square feet.

Mr. Apicella: I see. So this is a pollutant load. It doesn't actually measure what the actual runoff or pollutant is.

Mr. Reese: Well, we estimate that based on the simple method formula that .35 pounds of phosphorus per year will leave this site. That was true before the gazebo was built. It was true after the gazebo was built.

Mr. Apicella: Thank you.

Mr. Ingalls: Mr. Reese? I guess if I was sitting here in a vacuum and not knowing a lot about Chesapeake Bay, I would have thought you made super case, that we could go and develop all the County and it would clean up the Chesapeake Bay. Because this thing has so little runoff. It's way below what the state is and you just say "Oh it works better, this is like an BMP". Well we might as well build every lot we can build and that way we get all these nice BMPs and you and I both know that's not true.

Mr. Reese: Well Mr. Ingalls, I would say it was true if you would restrict all development to 10% imperviousness. If you could do that, without a doubt, you would have less pollution leaving Stafford County than what would be required.

Mr. Ingalls: You and I can talk about that later.

Mr. Reese: Yes, it would be a good discussion.

Mr. Apicella: I'm looking at the Administrative Code 4VAC50-90-40 definitions says "impervious cover means a surface composed of any material that significantly impedes or prevents natural infiltration of water into the soil. Impervious surfaces include, but are not limited to, roofs, buildings, streets, parking areas and any concrete, asphalt or compacted gravel surface." I don't see any exceptions, so by my reading the code, seems to me that a walkway is impervious. There's no flexibility in the definition.

Mr. Reese: That's correct.

Mr. Apicella: Okay, just wanted to clarify. Thanks.

Dr. Larson: My question was, you mentioned the number 10 % impervious. Could you explain that a little bit more? What do you mean? Is that the side walk that's allowing 10% of the water through?

Mr. Reese: This is roughly a 3 acre lot and on the 3 acres there's a driveway, there's a house, there's walkway and there's a gazebo. If we calculate all of that area, it amounts to less than 10% of the 3 acre site.

Mr. Grimes: Can I seek clarification on that? In your post-development you call it the gazebo. Was the brick walkway included in the square footage with the gazebo?

Mr. Reese: Yes.

Mr. Grimes: Okay.

Dr. Larson: Any other questions for this witness? Thank you, Mr. Reese.

Mr. Reese: Thank you.

Mr. Leming: Mr. Chairman, I think what this comes down to is that you have a structure on the property that has no appreciable impact in terms of pollutants on the property or in the Bay. I think that's demonstrated through the water quality impact assessment. The study is conducted according to the standards that are prescribed by the County. I think that if you look at the very end of the Maryland Attorney General opinion that I gave you, this brings all this discussion to a conclusion about water dependent sources and other things that they went through in that analysis. But the Attorney General of Maryland concludes by saying in summary that it's our opinion that the Board of Public Works, Secretary of Natural Resources correspondent to our Virginia counter parts here may not grant a permit for a non-water dependent structure of any kind whether large or small or on a pier, an estate or private wetlands. Very consistent with the regulations that we have. The Board and the Secretary do have authority however to determine whether particular construction projects, including small scaled coverings that are either water dependent or so insignificant in terms of the public policy concerns of chapter 7-94 which is where Chesapeake Bay was incorporated in the Maryland Law, is to be outside the term structure and therefore to be permissible. Based on the water quality impact study I think that there is an argument that that's the case here, that what you have is a structure that is so negligible in its significance, bear in mind that the Woltzs have a lot that has approximately ¾ of an acre encumbered by RPA. RPA that at the time they purchased they didn't know it's been cleared. It's solely a grass surface and been cleared since the early 90s. All they did to install this additional structure, this additional impervious structure was to remove the grass that had been located in that place. Mr. Reese indicated something about the plantings. I think that's more relevant to the variance and the conditions that the staff had suggested, to go run with a variance that would be considered in the context of the next hearing. But, I will tell you at this point that the Woltzs don't have any problems with the plantings at all. There are a number of plantings on the property all the way back to the house as a matter of fact, but everything is cleared within the entire RPA. There is no vegetation at that level. So I would ask for your consideration along the lines of the Maryland Attorney General's opinion and that is that this is a structure that in the overall context of the purpose of the act and the impact on the RPA that is so negligible that it really should be permitted under one of the basis that we have suggested here. We thank you for your time.

Dr. Larson: I have a question, Mr. Leming. The RPA was instituted in 89 correct.

Mr. Leming: Yes, approximately.

Dr. Larson: Do you know if your client was aware of that?

Mr. Leming: Well he went to the County. Do you have that permit from the County, Ron? He did go to the County in 91 to seek clearing of the area in question here and did get a permit from the County. I'll tell you what, I'll let him tell you that.

Mr. Woltz: What we did in 1990, April of 1990 specifically, we had a severe erosion problem over on a portion of the waterfront. I have 338 feet of waterfront and if you were looking from the road back towards the river, 100 feet to the right we added a seawall which is roughly 4 feet high, but we've done that because of a severe erosion problem there. It actually makes an L and does a return and there is some riprap beyond that, but that was the timing of the seawall and then at the same time, well I shouldn't say at the same time, within that same construction activity we went back to the County and got a permit to clear and burn the other 238 feet of property. In other words, the first permit covered the seawall and whatever was necessary to build the wall and then the 238 feet beyond that was what we got a permit to clear and burn the debris and that's what I have here.

Mr. Leming: You can pass that around if you'd like. And Ron, Dr. Larson's question was did you know about the RPA?

Mr. Woltz: Absolutely not.

Mr. Leming: Why don't you come back over here to the mike.

Mr. Woltz: When Mr. Staranowicz came out and we had a conversation, and I know he can verify what I'm saying, it wasn't clear to me what an RPA was. You know, it was a completely foreign term to me at that time and that was December of this year… I'm sorry, 2012.

Dr. Larson: Okay, so back in 1991 what prompted you to get the permits for clearing the brush?

Mr. Woltz: Well, because I knew eventually I was going to build a house there. The wall was put in for erosion purposes and the same people that put the wall in, did the clearing, so that I had visibility to the river. It was overgrown there. We kept all the large trees. The only thing that was taken out was the small underbrush at that time and that's what you see today.

Dr. Larson: But my question was, why did you feel compelled to get a permit for that? To clear underbrush?

Mr. Woltz: Well it was required by the County. We knew that, because it was a large area. There was a minimum…

Mr. Leming: Twenty-five hundred square feet.

Mr. Woltz: … 2,500 feet or so that I could clear without permit, but that area was larger than that significantly. So it was a requirement to get a permit to clear.

Dr. Larson: The 2,500 square feet, that comes from the RPA verbiage as I recall.

Mr. Leming: That's from your soil and erosion provision. If you're clearing more than 2,500 square feet you have to have a grading permit.

Dr. Larson: So maybe it's duplicated in that.

Mr. Leming: So that's what prompted the permit. It wasn't because of the Bay Act. He has approximately… I think Mr. Reese estimated about 38,000 square feet of RPA across the property.

Mr. Ingalls: So he did remove undergrowth within the RPA? So some land disturbance was done with that permit.

Mr. Leming: In 1991 yes.

Dr. Ackermann: May I ask a question, sir? Mr. Woltz, about how many people show up for the bird count?

Mr. Woltz: There is typically 3 to 4, it varies from year to year. It's a Christmas bird count from the Audubon Society.

Dr. Ackermann: Are you a member of the Audubon Society?

Mr. Woltz: No, I am not a member, but I stay in touch with them.

Dr. Ackermann: And volunteers could do the bird count?

Mr. Woltz: Sure.

Dr. Ackermann: Okay, so did you do it there last year?

Mr. Woltz: Yes.

Dr. Ackermann: What did you get? What did you find? Do you remember what you found?

Mr. Woltz: Well, I always get a list of what was done for the County, but specifically what we've seen there, we did see eagles and I know we seen heron on that given day. Remember that's a snap shot one time, but I do get a report, which as a matter of fact I have, of what the actual count was for our area and for a larger area. They call that the Brook Area.

Dr. Ackermann: And the bird count goes on for a couple of weeks, right?

Mr. Woltz: It's two weeks.

Dr. Ackermann: Do you ever participate in the bird count in February, the great, big backyard count?

Mr. Woltz: No, I don't. Just that one.

Dr. Ackermann: Okay, thank you.

Dr. Larson: Any other questions for Mr. Woltz or Mr. Leming?

Mr. Ingalls: One simple question. Why didn't you get a building permit for the gazebo?

Mr. Woltz: Ignorance. It was one of these things that I didn't know exactly why I was going to build. As a matter of fact, whenever I was cited, I went to the County. I was cited on a Friday if I remember right and I went to the County immediately whenever I was told that I had to have a permit and was, you know, with the plans and the plat, etc. and I was told by Mr. Deem that the drawings I had were insufficient to even make an application. So I did at that point hire a professional engineering firm to document the as built drawings and certify its structural integrity at that point and that took about a month at which time we then submitted the permit. But the reason I didn't? What can I say? Ignorance! I mean I just didn't know – it wasn't something that I lived in. I guess I looked at in that sense.

Mr. Ingalls: How long have you lived in the house?

Mr. Woltz: We built the house… we started in 96 and finished in 97.

Mr. Ingalls: So you've been in the County.

Mr. Woltz: I have owned the property since 1983. Whenever we bought the property, if you come down Brooke Road, you'd be fortunate if you ever passed another car on the road in.

Mr. Ingalls: Have you heard the term Chesapeake Bay Act?

Mr. Woltz: Yes.

Mr. Ingalls: Over those many years?

Mr. Woltz: I have, yes.

Mr. Ingalls: Did you wonder how it would impact you?

Mr. Woltz: I can't say that I did or didn't. I'm aware of its purpose. I don things, I don't fertilize, I certainly do a lot of plantings and try to do things and do things that I feel are environmentally conscious and I'm certainly appreciative of the effects that we've had from the Chesapeake Bay Act. I can tell you, in 83 you wouldn't swim in the Potomac. I mean, I wouldn't eat fish out of there. It was pretty bad back then and so I'm definitely very cognizant of the need to be environmentally conscious and do my part.

Dr. Larson: Did your neighbors ever talk about the Bay Act at all, being on the Bay as well? Wasn't there ever a conversation of the people that were affected by it? I mean, do you ever get together with your neighbors and talk about local issues.

Mr. Woltz: I can't say that we do.

Dr. Ackermann: I guess along those lines you have several neighbors who abut you. When I look at the aerial photograph, I don't see anybody else with a gazebo and a walkway out towards the Potomac. Did it not strike you? Isn't it somewhat interesting that nobody else has anything similar?

Mr. Woltz: No. To me it was a natural thing. My neighbor does have a pier. I mean certainly he walks to that pier. He doesn't have I sidewalk to it. But if you were to look at our neighbors to the right of me, they certainly have a path and they have their folding chairs and they do come down, just as I do in the gazebo, and enjoy the water view. I particularly do it early in the morning. I'm a bird watcher. I like to be up and be there when the sun comes up. I'm very still and I have my binoculars. To me it's extremely therapeutic

to be there and watch the activity. It's not just the waterfowl, it's also the deer, we have beaver. To me it's just very therapeutic.

Dr. Ackermann: I can appreciate that. Would it not be possible to move the gazebo back towards the property line where you would not be on the RPA and still be able to watch the birds?

Mr. Woltz: Well, I guess the answer is – could you watch birds from further back? Yes, the analogy I would make is, if I'm going to a show I can either sit in the bleachers or I can sit in the orchestra section and this would be the orchestra section. Could you see the show? Kind of, yes.

Dr. Ackermann: Respectfully you could put up a pop tent or whatever, a temporary tent to do the same thing, right? Not a permitted structure to achieve the same end?

Mr. Woltz: Could you? Yes.

Dr. Larson: Any other questions for Mr. Reese or Mr. Leming?

Mr. Leming: Or Mr. Woltz.

Dr. Larson: I'm sorry, Mr. Woltz. Okay, thank you gentlemen.

Mr. Leming: If the permit has gone all the way around, if we could collect that or see that it gets to the end over here. We'd be happy to substitute a copy of it for the record, but I don't want to take his original there.

Dr. Larson: Alright. Any member of the public who wishes to speak in support of the application, please come forward. Sir?

Mr. Pollo: Good evening. My name is John Pollo. I am a neighbor across the street from the Woltzs and I wanted to come here just to talk very briefly from a neighbor's perspective about the project. I'm not getting into any of the legal discussions. That's why he is represented here. But from a neighbor perspective I wanted to point out that the project, I guess unlike a pop tent, is certainly a very attractive, a very well done project. It is very much harmonious and in keeping with the flavor, the nature of the neighborhood and certainly do not find it, to say the least, to be obnoxious from an esthetic standpoint whatsoever. If anything, I think it actually adds value to the neighborhood. It was done in a very, very first class kind of a fashion which is frankly representative of the very meticulous nature of the Woltzs and frankly everything they do, with respect to their property. I personally would like to not see it removed. I am in favor of it. I've been down to the structure, been down to the sidewalk area/patio area before the structure was built and I've been down there any number of times after the structure was built as well, and I like the Woltzs also enjoy coming there, not being a water front property owner. Yes I do have a water view, but it's not the same as being able to be very close to the water. Even in comparison to, say, their back porch on their house, the views are substantial different when you get very close to the water there and being able to do the birding. Everything from the herons, the eagles, the osprey that comes seasonally to the area, not to mention all the other types of birds and other kinds of wildlife that come to the area. And it's something that I know that I and my wife very strongly enjoy whenever we have the opportunity to come down there and having the structure as compared to the open area, frankly does, I think, help facilitate a little bit in terms of being a little bit more incognito vis-à-vis the wildlife and also, if it's in the daytime it helps keep the sun off of you as well. So I just wanted to make those

basic comments that, as a neighbor, again I think it is a well done structure and I'm in support of it and I hope that the Board will take position that will enable it to remain.

Dr. Larson: Are there any questions for Mr. Pollo? Thank you, sir. Any other people that want to speak in favor of the application? Okay, any member of the public then that wishes to speak an opposition? Are there any of those? Mr. Leming, do you have anything you would like to close with?

Mr. Leming: I think we've covered the issue and you all asked your questions. This is the application on the appeal. The variance application will follow.

Dr. Ackermann: May I ask a question?

Dr. Larson: Yes.

Dr. Ackermann: Mr. Leming, in the photos of the gazebo there is something wrapped in plastic. What is that?

Mr. Leming: I'm going to let Mr. Woltz explain to you what that is.

Mr. Woltz: That picture was taken in December of this year. We have some tables and chairs on the gazebo. We cover them during the winter month. So that's just a big tarp to cover. It's open in the middle.

Dr. Ackermann: Thank you. I was just curious.

Dr. Larson: Any other questions?

Mr. Gibbons: I have one question. You presented this ruling from Maryland?

Mr. Leming: Yes, sir.

Mr. Grimes: And since we got this tonight and I haven't had a chance to go all the way through it. Right in the title it indicates that this really applies to small coverings on piers, not, and maybe I'm incorrect, but it doesn't look like it applies to gazebos built on land. It applies to piers, is that correct?

Ms. Karnes: It does discuss covers on piers, yes, and also discusses gazebos.

Mr. Leming: Both are discussed in it, but I think the critical language is contained at the conclusion, after there's discussion about both of those.

Mr. Grimes: Right, and the reason I asked is, because I read the conclusion and it does specifically say whether large or small "on a pier". It doesn't talk about building on a land. On the very last page of the ruling in the conclusion. And the only reason it caught my attention is, on the very first page it specifically say "authority to license small coverings on piers".

Mr. Leming: As I read it, I did not pick up on that. It says… this is not binding, this is purely persuasive, Board of Public Works Secretary of Natural Resources may not grant a permit for a water dependent structure of any kind, whether large or small, on a pier in state or private wetlands. That's the reference in piers. I think, what you have to do is, read through the whole opinion, then it goes on to say that they do have the authority to determine whether particular construction projects, including "smaller scale

coverings, or either water dependent, or so insignificant" in terms of the public (inaudible) and therefore to be permissible. So the first sentence does talk about the piers in the context of water dependent structures, but in fairness, I realize that this is a fairly lengthy opinion and it goes on at some length and Ms. Karnes is the one that came up with this today, but it does discuss both water dependent structures and structures generally. If you look at page 33, section C, there is a general discussion about structures generally. Not clear from this, whether it's talking in the context solely of pier or generally. It appears to be talking about structures generally. I assume that what was going on here was that there was a pier and someone wanted to put a gazebo on the pier, but if that's the sole issue this dealt with, then it wouldn't have been discussing RPA, because RPA is landward, not out in the water.

Dr. Larson: Are there any questions for Mr. Leming, not related to this document that we're discussing? Okay, thank you.

Mr. Leming: Thank you all very much for hearing us.

Dr. Larson: Okay, we'll now close the public hearing. Bring it back to the Board.

Mr. Ingalls: Mr. Chairman?

Dr. Larson: Yes.

Mr. Ingalls: I move that the BZA uphold the notice of violation dated December 18th, 2012 regarding Section 28-62(f)(1)(a)1 "Development Conditions", Section 28-62(g)(1)h and Section 28-62(g)(2)f.1., Critical Resource Protection Area Buffer Requirement, for unpermitted land development in the Critical Resource Protection Area on Tax Map 41C Parcel 7.

Dr. Larson: Okay, there is a motion to uphold the letter of violation. Is there a second?

Dr. Ackermann: Second.

Dr. Larson: Discussion?

Mr. Ingalls: Mr. Chairman, the reason I made the motion is I think it's pretty clear from what I read and what the ordinance says that this structure is not allowable in the RPA. Mr. Leming said is there is some extenuating reasons why maybe it should be. He should have come and got a permit for it. If he was, the County would have granted the permit and since no permit was granted, the structure, to me, is an illegal structure in the RPA.

Dr. Larson: Any other discussion?

Dr. Ackermann: I seconded it for those reasons and also because I think the violation was issued appropriately, which is pretty much what Mr. Ingalls said… issued appropriately because the structure is in violation of the code. My opinion.

Dr. Larson: Any other discussion? I tend to agree with the motion. It appears to me pretty clear, that the two requirements for building in the CRPA were not met. One was the permission from the County through proper channels. A good step in this regard would have been a building permit. And the other is, I can't see how this structure requires water. There are lots of places that have gazebos and aren't near the water and on the other hand you can certainly watch birds without a gazebo. So I think it's pretty clear

that the documentation is referring to structures that require water to be there, like a dock, or something that has to do with a boat or something that requires water. So that's my opinion on that. Any other comments? Alright, I'll call for the question. Those in favor of the motion say aye.

Mr. Apicella: Aye.

Mr. Davis: Aye.

Mr. Poss: Aye.

Mr. Grimes: Aye.

Mr. Ingalls: Aye.

Dr. Ackermann: Aye.

Dr. Larson: Aye. Any opposed? Okay, the motion carries. Next case.

2. V13-02/1300245 - Leming and Healy, P.C. for Ronald L & Elvira Woltz - Request a Variance from Stafford County Code, Section 28-62(f) "Development Conditions" and 28-62(g)(2) "General Performance Criteria", for an existing structure and path to remain located within the Critical Resource Protection Area (CRPA) on Tax Map 41C Parcel 7. The property is zoned A-1, Agricultural, located at 99 Canterbury Drive, Canterbury Estates Subdivision.

Ms. Keith: You have in front of you the application, owner's consent form, house location survey dated 4/16/97 and building permit application, maps, major water quality impact assessment and mitigation plan. Staff report states the County was required to adopt local land use and comprehensive planning requirements as part of the approval of Virginia's state mandated Chesapeake Bay Preservation Act requirements in 1989. The County has adopted these requirements in Section 28-62 of the Zoning ordinance as the Chesapeake Bay Preservation Area Overlay District. One of the requirements of the overlay district is the designation of a Resource Protection Area. An RPA is defined in Section 28-62(b)(1). Assessor's Parcel 41C-7 is located in the Canterbury Estates subdivision on the Potomac River. The tidal shore of the Potomac River is protected by a Critical Resource Protection Area (CRPA) buffer as required by Section 28-62(b)(1). The 100-foot CRPA buffer covers a portion of the lot, as shown on the plat of survey. The presence of the CRPA buffer on the lot limits land development to those allowed uses listed in Section 28-62(f). A gazebo was discovered by other County staff members during other building inspections in the area and was referred to environmental staff for enforcement. During the enforcement process, it was noted that the structure and a portion of the brick path were located within the CRPA. As the gazebo was not an allowed use listed in 28-62(f), a Notice of Violation was issued. In addition to the CRPA, a portion of the property (including the gazebo) is located in the Flood Hazard Overlay District (100 Year floodplain-Zone AE). The County's Flood Hazard Area Overlay District requirements apply to properties located within the 100 year floodplain and therefore those requirements are applicable to this project. The applicant has completed construction of a gazebo with a brick floor and walls, and a brick path, in the location shown on the attached site plan. Construction of the gazebo and path commenced without the necessary building permits or approvals. The gazebo is approximately 23.3 feet in diameter and is located within the seaward 50 feet of the CRPA buffer. The portion of the brick path that is located within the CRPA buffer is approximately five (5) feet wide and approximately forty-five (45) feet long for a total of two hundred twenty-five (225) square feet and is located within the landward 50 feet of the CRPA buffer. If the Board approves the request, staff recommends the following

suggested conditions: (1) property owner shall sign and implement the attached Mitigation Plan; (2) development of the site shall be in accordance with all appropriate requirements of Chapter 11 (Erosion and Sediment Control) of the Stafford County Code. Please be advised that the standards for approving a variance of Section 28-62 are specifically identified in Section 28-62(l) and those should be used instead of the standards listed in Section 28-350. That's it Mr. Chair.

Dr. Larson: Any questions for staff?

Mr. Apicella: Mr. Chair, I have a fundamental question about a variance in this case. As I understand it, the Chesapeake Bay Act is, I think, a federal requirement, a state requirement and a local requirement. How can someone seek a variance from, at a minimum, state requirement? We have our own implementing regulations, I understand that, but at the end of the day, we still have to meet the state requirements. How can this Board grant a variance from the state requirements?

Mr. Hubble: Just a clarification. This Chesapeake Bay Act we're talking about is particular to Virginia. It's a piece of state legislation. It came out of federal agreements amongst the states, but it is specific to Virginia. So in this instance we're basically dealing with the state code which drives a required, local ordinance. So in the State Code it gives the County provisions to grant, what are referred to in the Bay Act as exceptions. Because the Stafford County houses the Bay Act in our Zoning Ordinance, those exceptions become variances. I'm not sure if that specifically answers.

Mr. Apicella: It does, absolutely. Thank you.

Dr. Larson: Any other questions for staff.

Mr. Ingalls: One just to clarify. The other thing that was thrown in with this is the floodplain. I assume there is some requirements if the structure is to remain there that would have to be met or not. Us approving or disapproving this thing doesn't eliminate those requirements. If we were to approve it, they still have to go through some type of floodplain analysis or whatever?

Mr. Hubble: That's correct. And thinking about it a little more today, I don't expect it to be significant. I think we can find a route for compliance if this is approved, but yes, it still does have to be addressed.

Mr. Ingalls: Thank you.

Dr. Larson: Any other questions for staff? Okay, would the applicant or representative come forward to represent the case?

Mr. Leming: Much of the material that we talked about and discussed and a number of your question during the appeal proceeding also go to the variance application. That's why I will not go through background again. I think you all know most of the background and how the Woltzs got into the situation they're in today. You've also heard Mr. Reese's testimony regarding the water quality impact assessment which would be a requirement of the variance. And I think you are familiar with the results of that. So I wish to incorporate those results from that presentation into this one. If you have other questions about those things that were covered previously please don't hesitate to raise them. Mr. Hubble indicated something that is unique to Stafford County and may affect how you proceed here. You've been advised here that the standards for approving a variance or an exception are specifically identified in that section and I believe that there is…I have a list of those…the issue that I had and that occurred to me, we used the variance criteria that were contained in the package. And the reason for that is, just what Mr. Hubble said.

And that is that in Stafford County, unlike any other County that I'm aware of, the Chesapeake Bay Regulations come in through your Zoning Ordinance. There have been a number of occasions when that's had an impact, for instance, in vesting determinations. The case further this evening is a vesting case. When we obtained vesting decisions we also were determined to be vested for Chesapeake Bay Regulations, because that was part of the Zoning Ordinance in Stafford County. Now why is that relevant here? It really has to do with the criteria that are applied. And they are somewhat different. There are a number of similarities in the criteria and I'm going to go through both them, but they are not exactly the same and I think in light of the fact that this arises from the Zoning Ordinance, I think you're going to have decide which ones apply. I'd also point out that the state law provisions have been revised, governing variance criteria arising from zoning matters. They were amended in 2009 and state law is very clear on what the criteria are for a variance. And a variance is defined very clearly under state law. In the application of Zoning Ordinance a reasonable deviation from both provisions regulating the size and it goes through all the factors that you can consider to look at. In this case what we have are regulations that are in your Zoning Ordinance and a request for a variance that arises from those regulations in the Zoning Ordinance. So there is, I think, some issue as to which of the criteria apply, given the state law requirements and these. I'm not sure one is any more favorable or dis-favorable than the other. They're simply different and I'll bring that to your attention because I've decided that the best thing to do is to simply go through both of them. If we look at the state law provisions, and what I'll like to do at this point, I think everybody understands enough about the background of this case that we can turn our attention to the actual standards or criteria that the Board would have to consider in granting a variance here. So, with you all's permission, I'm going to jump ahead to that, because that seems to be the most pressing matter at this point. Under state law there are actually now 3 provisions: (1) that the strict application of the provisions of this chapter would produce undue hardship relating to the property; (2) that such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (3) that the authorization of such variance shall not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance. Now, under the Chesapeake Bay Criteria there is some redundancy and we'll turn our attention to that in a moment. First however "strict application of the provisions of this chapter would produce undue hardship relating to the property". In this case the uniqueness about this property has to do with its large amount of RPA. As we discussed previously, what we have is a lot that is encumbered by almost ¾ of an acre of RPA. The RPA is completely cleared. In this particular case, what the Woltzs seek to do is to utilize an extremely small portion of that RPA to pursue an ardent past-time that you've heard about. Now that's one way to look at it is in this particular case… and I'm going to share some discussions about this kind of issue from some other BZAs in a few moments… but in this particular case what we have is somebody coming to you, unfortunately after the fact, after the gazebo has been built, and is faced with, if there is not a variance granted, the removal of that and the removal of the walkway that goes along with it, that is already in place. And there are some jurisdictions that would look at that as the hardship. They would look at it through that prism. The hardship of actually having constructed this and then having to go through the steps of removing it. You may take the position "Well he brought this on himself. That's too bad. That's really not a hardship." There used to be language under this part of the code that talked about self-imposed hardships. That's not here in state law anymore. That part has been removed. So I would submit to you that the hardship in this particular case is that the owners have a piece of property that is unusual in the amount of RPA on it. That in order to access the water – and the testimony you heard in the last hearing – in order to be in the orchestra portion of the viewing area, rather than further back, that this accommodates their needs and that it would be unreasonable under these circumstances not to permit them to utilize the property under these circumstances, particularly in light of the water quality impact assessment which shows that there's no pollutant impact, because of the structure that is on the property. Now the second prong under state law is that the hardship is not shared generally by the other properties in the same zoning district and in the same vicinity and Mr. Reese, I hope I'm not catching off guard, but

are you in a position to compare this property to other properties on that particular issue, or at least the neighboring properties and talk about what's unique about this particular property.

Mr. Reese: Mr. Reese with The Engineering Groupe. Mr. Chairman, members of the Board, I think the uniqueness of this particular circumstance is the minimal amount of impact that the intrusion has going into the RPA and the large amount of RPA that's on the sight. It's true that literally any property in the County that has frontage on a title shore is going to have a 100 foot buffer. This disadvantage that this particular property has is the width of the property and the amount of land that's encumbered. So I think from that aspect and the minimal amount of impact and the large amount RPA on the site make this a relatively unique parcel.

Dr. Larson: Question for Mr. Reese? Please.

Mr. Ingalls: Did you notice any other structures located within the RPA on any of the other lots in that neighborhood?

Mr. Reese: Well there was a pier that went out into the river.

Mr. Ingalls: They're not in the RPA.

Mr. Reese: That pier has to touch the land somewhere.

Mr. Ingalls: Touch, okay. But on the landward side of the RPA?

Mr. Reese: I did not observe anything.

Mr. Ingalls: Okay.

Dr. Larson: I had a question as well. Or did you have something?

Dr. Ackermann: Yes, I am looking at the package from the last issue that we looked at. I've got just the tax map and I've got the aerial. You're saying that this parcel is unique? Because when I look at it I see a lot of parcels that look fairly similar. In some cases the width of the parcels are actually longer than this parcel. So I'm not following you on the uniqueness of this particular parcel.

Mr. Reese: It's unique in that. It has a combination of a minimal impact on the small amount of area that's been disturbed and the amount of area that is RPA. So it's the combination of the two.

Dr. Larson: My question deals with the disturbed area which I think is, if I understand your methodology correctly, is important to your answer. It seems to me that, what you're talking about when you say minimal impact, I don't want to put words in your mouth, but the way interpret it, tell me where I'm wrong. Minimal impact then means the ratio of disturbed to undisturbed area.

Mr. Reese: Yes, Sir.

Dr. Larson: So if I were to disturb the area in any way, as long as it was a small area, it would have a minimal impact. Correct?

Mr. Reese: Correct.

Dr. Larson: So if I had a drum of hazardous waste, just hypothetically, there but it only covered only 2 or 3 square feet of surface area, it would have minimal impact, correct? Based on your methodology?

Mr. Reese: No, I'm not sure I would make that leap of faith. I would say that a concrete walk would have much less impact on any hazardous material.

Dr. Larson: But what I'm saying is, your methodology is a ratio of a disturbed and undisturbed area.

Mr. Reese: That's part of it, without a doubt, but you can't ignore the type of intrusion also.

Dr. Larson: Okay, so there is something in your methodology that deals with the type of intrusion.

Mr. Reese: Yes.

Dr. Larson: Can you describe that in 1 or 2 minutes?

Mr. Reese: I think it's important to understand that intrusions are allowed into the RPA, including boardwalks and paths and trails. Those are all allowed intrusions into the RPA and the method of constructing those is left pretty much up to the landowner. And let's say that this were a boardwalk. I would compare a boardwalk, which is lightly treated lumber, to a brick and concrete sidewalk and I would say the brick and concrete sidewalk is much more inert than a chemically treated lumber boardwalk which is, black and white, allowed within the RPA.

Dr. Larson: But how does your methodology treat the difference between the chemically treated boardwalk and the chemically inert cement.

Mr. Reese: I would say the inert cement is less of an intrusion than the boardwalk, but the boardwalk is an allowed intrusion. If this were a boardwalk, I'm not sure we'd be here this evening. Boardwalk is an allowed intrusion.

Dr. Larson: Okay. I'll stop. Any other questions for the witness? Okay, Mr. Leming.

Mr. Leming: I think one other factor involving this particular criterion is that in this particular case, although clearing had been done on the property earlier, it was pursuant to a permit. There was no clearing. There was nothing that had to be removed from the property, except sod, in order to install the patio back in 1998. The gazebo, the covering did not require any kind of disturbance of the land at all, because the surface had already been provided and it was simply built over that. So in that respect I think that this is unique. Any other property that didn't have any structure on it would be starting from scratch. The third prong under state law is the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance. I think the most important testimony on that came from the neighbor. A gazebo is not something that is going to fundamentally change the nature of the zoning district, whether it be the underlying zoning district or the Chesapeake Bay overlay. And it certainly does not detract or is detrimental to the overall property. Now those are the provisions under state law that were adopted for a variance consideration in 2009. In the Chesapeake Bay regulations there are five standards that are set forth. The first is that granting the variance will not confer upon the applicant any special privileges denied by this article to other property owners in the overlay district. Obviously any other property owner that sought to build something in the RPA would be subject to the same requirements that are applicable to the Woltzs. So there is nothing that in and of itself a variance confers on anybody else within the overlay district. Anyone

else would have to demonstrate that they had met the criteria for a variance, or one of the exceptions under the Bay Act, or had come in with a water dependent structure. The second criteria: The variance request is not based on conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or non-conforming that are related to adjacent parcels. The second part I don't think is applicable here. The first part of this is of some concern. There are two ways to look at this. I you look at this from the standpoint of Mr. Woltzs posture right now, the reason, the exact reason he needs a variance is because he's built a gazebo and doesn't have one and doesn't have the appropriate authority. What I would suggest to you is that the appropriate prism to look at this is to back up to the point in time when Mr. Woltz could have applied for this. Because if you look at it from the standpoint of the present day, no one coming to you with an existing structure, would qualify under these criterion. Now maybe the lesson is: Don't do it until you get the proper permits! But I don't think that's the purpose of a variance. I think the purpose of the variance is to look at an application from the standpoint of the property owner at the time that the variance could have originally been sought. And I think in this particular case, what Mr. Woltz was seeking was the structure that he has installed, that was not something that he imposed on himself, it simply resulted from his desire to be closer to the water and engage more directly in his advocation, as you have heard. The third prong is: The variance requested is the minimum necessary to afford relief. Of course the only thing Mr. Woltz is seeking, is a variance that would cover what he has built, nothing more than that. He is not requesting any kind of expansion obviously at this time, but simply that you approve what he has already constructed on the property.

Mr. Apicella: Mr. Leming, I've seen this in a couple of different exhibits, but this one is from the soil report produced by the engineer. So, you just indicated a criteria that has to be met in order to get a variance under the RPA. It seems to me that there are many options for siting this gazebo and walkway on this parcel that would not encourage upon the RPA. Do you agree or disagree?

Mr. Leming: Well, this is a request for a variance.

Mr. Apicella: I understand, but you indicated that the criteria is that it's the minimal amount of relief should be granted. And again I would say, when I look at this map or this layout, there are numerous options for siting this gazebo, including outside of the RPA.

Mr. Leming: If we put it outside the RPA then there would be no relief.

Mr. Apicella: Well, that's an option right?

Mr. Leming: But the criterion is the minimum relief necessary to afford the relief.

Mr. Apicella: So it could be moved up to 1 foot into the RPA and still be adequate relief.

Mr. Leming: Well, in that particular case it wouldn't be as effective as it is for Mr. Woltz permit.

Mr. Apicella: But that's not the criteria. The effect is not the criteria, it's the minimum amount of relief.

Mr. Leming: Well, then I guess it depends on what the Board construes as relief.

Mr. Apicella: Okay.

Mr. Leming: D. The variance request will be in harmony with the purpose intended at the overlay district, not injures to the neighborhood and otherwise detrimental to the public welfare, not a substantial

detriment to water quality. Now the first part of that very much parallels the criteria under state law and I think you would agree with me that there is nothing here that would harm the purpose intended for the overlay district or injurious to the neighborhood or detrimental to the public welfare. The second part of this is what Mr. Reese has addressed and that is that it is not of substantial detriment to water quality. The water quality impact assessment is designed specifically for that purpose and of course indicates that there is no detrimental effect to the water quality, in fact even favorable conditions because of the situation of the property and the impervious surface that is already on the property. And lastly that reasonable and appropriate conditions are imposed which prevent the variance request from causing a degradation of water quality. There have been two conditions that have been proposed by staff. One is that the property owner sign and implement the attached mitigation plan. The purpose of the plan is to provide plantings which are supposed to assist with the water quality. You've heard Mr. Reese testify that they would not matter in this particular case, but Mr. Woltz has no problem installing the plantings. And last condition that staff included here, development of the site shall be in accordance with all appropriate requirements of chapter 11 "erosion and sediment control" of the Stafford County Ordinance. I think that goes to the question Mr. Ingalls asked about earlier. The fact that a variance is granted does not in any way remove the obligation to obtain other permits such as a building permit, which is what they were in the process of trying to obtain when the Chesapeake Bay issue arose. They would have to do that. They would also have to comply with other provisions of the local and state law. What we ask you to consider is this. What we really have here is a structure, regardless of which criteria you use, it's a structure that is not harming the bay and through the water quality impact study the whole property is shown to be actually beneficial to the bay, at least in terms of the standards that have been established for measuring that sort of thing. This is passive recreation. This is a long time Stafford County citizen who is engaged in a passionate hobby and constructed this, I think you've heard his testimony, not completely understanding, maybe he should have inquired rather, but not completely understanding that what he was doing was an intrusion into the RPA and it was unlawful. I think on behalf of Mr. Woltz, and if he wants he can come here and say this, I'm sure he regrets not checking into this more carefully at first, but requiring that he removes the gazebo and the sidewalk that goes with it is a fairly harsh result for something that is not negatively impacting the bay or causing pollutants and is something, as you have heard from the neighbor, viewed in a positive way within the neighborhood. So I would ask you with all due respect to find a way to help Mr. and Mrs. Woltz keep their structure here and we'll be happy to answer any questions.

Dr. Larson: Are there any questions for Mr. Leming?

Dr. Ackermann: Given the garage in Ingleside, so if the gazebo were to, God forbid, suffer some destruction, but if we granted a variance, then… maybe you folks or the County could help me out… what would be the process for rebuilding it? Would it have to be built the same size? Could it be built larger?

Mr. Leming: It could be replaced as it is, as it is has been approved, yes.

Ms. Keith: I'm sorry, I wonder if Steve wants to answer that.

Mr. Hubble: I was actually thinking you might take that more from a zoning perspective. I guess my take is, from the environmental perspective, that we would not necessarily automatically allow something to be rebuild after the fact, just because of the fact it was destroyed. There are different standards in the pure zoning sections of that, but I think our perspective is a little different there.

Dr. Ackermann: And the variance goes with the property right? If Mr. and Mrs. Woltz, when they leave the place and that may remain and someone can do what they want to it?

Mr. Leming: That's correct. And to go back to your first point. The zoning ordinance is very clear. This comes out of a zoning ordinance, the Chesapeake Bay regs here. If a building is not less than 50% destroyed then there is no question about it being rebuilt and otherwise there are provisions for the rebuilding under the zoning ordinance. There is one other thing I'd like to share with you. These are minutes from the James City Chesapeake Bay Board. They perform your function here. They review exceptions under Chesapeake Bay Act and these minutes were so remarkably on point and I just came by these this afternoon, but this concerns a gazebo. And it was built approximately 30 feet from a water way in question, in this case the RPA had not been designated at the time the lot was sold as was the case here. The gazebo was constructed and just like the Woltzs, these owners named Carter, came to the Chesapeake Bay Board requesting and exemption and they go through a discussion here and grant the exemption at the end of the process. The finding of the Board was that there was not harm that was being caused by this structure, that the lot had been predated the Chesapeake Bay Act and that the owners were not aware of the RPA or what they could or could not do in the RPA. And I think you have heard testimony to that effect from Mr. Woltz. They apply an older version of the criteria, but very similar to what current state law is; hardship not generally shared by other properties, Chesapeake Bay is not going to be adversely effected… and the applicant acquired the property in good faith and the hardship is not self-inflicted. So very much the same standard that was utilized here. Again, we came up with this at the very end of the day, but I'm happy to pass this around so you can take it into consideration.

Mr. Davis: What was the hardship?

Mr. Leming: The hardship? Well, the hardship in that particular case, I think as you read through the notes is, is having to remove it. Plus, it was already set up.

Mr. Apicella: Mr. Chairman?

Dr. Larson: Go.

Mr. Apicella: Have you had a chance to read our application, Mr. Leming?

Mr. Leming: I'm sorry?

Mr. Apicella: Have you had a chance to read the application, the Stafford County Board of Zoning appeals application for a variance?

Dr. Leming: Why don't you ask me what you want to ask me?

Mr. Apicella: Okay, so on page 7, variance specification part (a) note the Board of Zoning Appeals may grant a variance only if the applicant can clearly demonstrate a hardship. A demonstrated hardship refers to the shape and topographical conditions or some other unique characteristic of the property. For example, if a rear yard has a sharp drop off or hilly terrain when addition could otherwise be located legally, or if the property has 3 front yards. A demonstrated hardship is not, for example: having a large family in a 2 bedroom house and you need a first floor bedroom and bath. These are good personal reasons for a variance but they do not constitute a hardship. It doesn't have anything to do with the specific conditions of the land. So you're saying the hardship is associated with the cost of removing the gazebo, when I think based our collective view and developing the application, the hardship is based on the land itself and the conditions of the land not the impact on the…

Mr. Leming: You're reading from the standards and the application themselves. In your staff report it tells you, this is the matter that I first talked to you all about, that those are not the standards to be applied here. Well, I don't know which ones are to be applied here. I read you the ones from state code. The standards that staff says you should apply are the ones we went over last and they aren't covered in your application package there.

Mr. Apicella: Can you read again the hardship portion, because I don't necessarily think it differs from the state code portion on BZA variances.

Mr. Leming: Well it doesn't say anything about hardship. The standards are: Granting the variance will not confer upon the application any special privileges. The variance request is not based on conditions or circumstances that are self-created or –imposed. The variance request is the minimum necessary to afford relief. They'll be in harmony with the purpose intended at the overlay district. Reasonable, appropriate conditions.

Mr. Apicella: But Mr. Leming, part of your argument stands on the issue of hardship. You've made that point. I think you just passed out a document that speaks to hardship. So I'm just trying to get to what is the legal definition of a hardship under a standard variance review.

Mr. Leming: Under standard variance review… you've read what the application says. What you all have to decide is what appropriate criteria ought to be applied in this particular case and you have those that are in the package there. You have those that staff has said are applicable in this particular case and the ones that staff says are applicable do not cover hardship.

Mr. Apicella: Thank you.

Dr. Larson: Are there any other questions for Mr. Leming? Thank you, Mr. Leming. Is there any member of the public who wishes to speak in favor of the variance application?

Mr. Pollo: Again, my name is John Pollo. As I indicated before, that I am a neighbor across the street from the Woltzs and I'm not going to go through all my entire statement from before, but I would like to have that included in the record for this part of the hearing.
STATEMENT FROM PREVIOUS HEARING: "I am a neighbor across the street from the Woltzs and I wanted to come here just to talk very briefly from a neighbor's perspective about the project. I'm not getting into any of the legal discussions. That's why he is represented here. But from a neighbor perspective I wanted to point out that the project, I guess unlike a pop tent, is certainly a very attractive, a very well done project. It is very much harmonious and in keeping with the flavor, the nature of the neighborhood and certainly do not find it, to say the least, to be obnoxious from an esthetic standpoint whatsoever. If anything, I think it actually adds value to the neighborhood. It was done in a very, very first class kind of a fashion which is frankly representative of the very meticulous nature of the Woltzs and frankly everything they do, with respect to their property. I personally would like to not see it removed. I am in favor of it. I've been down to the structure, been down to the sidewalk area / patio area before the structure was built and I've been down there any number of times after the structure was built as well, and I like the Woltzs also enjoy coming there, not being a water front property owner. Yes I do have a water view, but it's not the same as being able to be very close to the water. Even in comparison to, say, their back porch on their house, the views are substantial different when you get very close to the water there and being able to do the birding. Everything from the herons, the eagles, the osprey that comes seasonally to the area, not to mention all the other types of birds and other kinds of wildlife that come to the area. And it's something that I know that I and my wife very strongly enjoy whenever we have the

opportunity to come down there and having the structure as compared to the open area, frankly does, I think, help facilitate a little bit in terms of being a little bit more incognito vis-à-vis the wildlife and also, if it's in the daytime it helps keep the sun off of you as well. So I just wanted to make those basic comments that, as a neighbor, again I think it is a well done structure and I'm in support of it and I hope that the Board will take position that will enable it to remain."
But I do want to just simply make the point that this structure is very much in keeping with the nature of the neighborhood. It does not impose anything negative on the neighborhood and if anything, I think it actually adds value to the neighborhood in terms of the character and I request the Board to please vote in favor of the variance in order to keep the structure.

Dr. Larson: Are there any questions for Mr. Pollo? Thank you, Mr. Pollo. Ms. Keith, would you repeat Mr. Pollo's testimony for the previous case in this case as well, right after he mentioned that he would like that repeated?

Ms. Keith: Give me one second to confirm with Stacie please. Yes, sir. I will.

Dr. Larson: Thank you. Any other member of the public that would like to speak in favor of the variance application? Would any member of the public like to speak in opposition to variance application? Okay. With that I'll close the public hearing and bring it back to the Board. Do I hear a motion?

Mr. Grimes: I'm still struggling with the hardship issue. Part of our variance granting requirements is that we don't by approving a variance grant as special privilege. By allowing this variance to be approved, wouldn't that be granting the property owner something nobody else has?

Dr. Larson: I think that's something you're going to have to sort out, unless somebody else would like to take it on, because I'm not going to answer yes or no here.

Mr. Grimes: Yes, I shouldn't have phrased it as an open end.

Dr. Ackermann: Mr. Chairman, in the absence of anyone else making a motion, I'm going to make a motion to deny the variance.

Dr. Larson: Motion has been made to deny the variance. Is there a second?

Mr. Davis: I second.

Dr. Larson: Okay comments.

Dr. Ackermann: Mr. Chairman, under either criteria that Mr. Leming referenced I do not believe that the standards have been met. He went through each of the criteria. I don't necessarily want to go through all of them again. Again, I think the property owner, with all due respect, should have followed the rules from the get go. I think he admits he should have followed the rules from the get go. I don't think we should necessarily condone…I don't want to call it bad behavior, because I don't think it was intended…but at the end of the day, as my colleague just said, it would condone what was done if we grant this relief, especially in the absence of, I think, the criteria. I think the property owner has options to do their bird watching elsewhere on the property, to provide some other means to do it, to move the gazebo and the walkway so that it doesn't encourage on the RPA. The bottom line is, in my view, it violates the RPA provisions and I don't think this panel should condone that, especially in this case since there's nothing unique about this property. There's nothing that would preclude the property owner from

re-sighting the gazebo somewhere else and giving him the proper enjoyment that they want, just not in the way that they want it.

Dr. Larson: Any other comment?

Mr. Davis: I second the motion, because I don't feel that there hardship requirements have been met. The code indicates that we can grant a variance when it alleviates a clearly demonstratable hardship as distinguished from a special privilege of convenience sought by the applicant. It is very clear to me that there is no hardship.

Dr. Larson: Anybody else?

Mr. Ingalls: Mr. Chairman, clearly this type of variance is probably the hardest we deal with. Where we're trying to solve a problem after the fact and we have solved them different ways. We've tried to look at each one individually and tried to apply each case and tried to listen to what's been said and each of them are different. Some people can look at a lot of them and say "Well they're all the same", but they're never the same. There's always things about each case that are different. And in this case I find it hard not to support the motion. I think that bird watching is certainly a passive activity that can be conducted in the RPA. I think you could certainly do it without a gazebo. Most people do it without a gazebo. The gazebo is not needed. You could put a bench down there and go and sit down there and have you a cup of coffee in the morning, or take a thermos of coffee if you need more than one and watch birds and be just fine and not impact the RPA. The need for the gazebo is not passive in my mind, at least not something that needs to be built, because it's a passive activity, bird watching. It just pains me to have to cause somebody to move it, but in all sincerity I think, someone who's lived on the water for 15 years or more should understand the rules and regulations that go with living on the water. Living on the water is probably one of the most regulated things here in the County and in the state now and especially with the RPA and all the other issues that go on. So we all should be citizens that should be aware of what the rules are and I think it would be conveying a special privilege to say "Okay, let this gazebo remain". I don't want to be here when those other, how many lots are along that river, come in and say "Oh, I want a gazebo". And what am I going to say? "Well, you haven't built yours yet, so maybe I'm going to have a easier time to say no to you. I just couldn't sit here and then next time when somebody comes in with one, say "Well were going to let you build one". But I think if he would have come before hand, maybe we would have looked at different. Even if the County had denied giving him permit, we could have probably looked at it and maybe we could have found a way. Maybe, I don't know. I think, as my colleague said, in this particular case, he could have built a gazebo outside of the RPA all together and he'd still be about 80 feet from the water's edge. So I mean he still would have had a nice view. Everything would have been perfect. So, like I said, right now I find it hard to say that I'm not going to support the motion, but it's going to be that I'm going to support it.

Dr. Larson: Any other comments or discussion on the motion? I think I'm going to support the motion and it also pains me to do that, because of the implications for the owners, but I think it would convey a special privilege that the other properties do not have and that is one of the RPA exception requirements that you read, Mr. Leming. Another one was it should not be self-imposed and I believe it is self-imposed. Perhaps not intentionally, but self-imposed none the less. So I think I'm going to support the motion. Any other discussion? Okay, the motion is on the floor. Those in favor say aye.

Mr. Apicella: Aye.

Mr. Davis: Aye.

Mr. Poss: Aye.

Mr. Grimes: Aye.

Mr. Ingalls: Aye.

Dr. Ackermann: Aye.

Dr. Larson: Aye. Any opposed? Okay, motion carries. Next case.

Mr. Leming: Mr. Chairman, the next case is mine too. Would you give us a few moments?

Dr. Larson: Certainly.

There was a short break.

3. A13-03/1300225 - Leming & Healy, P.C. for Theatre Square LC - Per Stafford County Code, Section 28-349, "Appeals to board generally", the applicant is appealing a Zoning Administrator's determination letter dated April 9, 2013 regarding vested rights on Tax Map 44R Parcel 5 (formally known as Tax Map 44 Parcels 47A, 47B and 47C, The Property). The property is zoned B-2, Urban Commercial.

The meeting reconvened.

Dr. Larson: Are you ready, Mr. Leming?

Mr. Leming: Here is what I'd like to ask. We are, my client is aware that he has the ability to have 7 members of the BZA here. I've advised him that straightly on statistical basis that this increases somewhat the odds on his behalf. Mr. Ingalls can't participate tonight. I know that one other regular member of the BZA is not here. I know there's one more alternate. So I have a question. If we defer this until July, your July meeting, is there the likelihood that there will be seven members present on that occasion?

Dr. Larson: I can't guarantee that, but I guess you're pointing out that there's going to be, what, six now. I agree with you, statistically. Seven is better than six. That one person might be the difference.

Mr. Leming: Well we can't win on a tie.

Dr. Larson: That's correct. I wouldn't be against deferral. Are either of you gentlemen from the public and would like to speak?

Mr. Leming: No, they're my clients.

Dr. Larson: Okay. I there were members of the public here then I would have liked to have heard what they had to say before we…

Mr. Leming: They may want to tell you something, but they're with me.

Dr. Larson: Okay. If nobody on the Board has objection to deferral then I would be definitely open to that.

Dr. Ackermann: And what's the date of our July meeting? Looks like it's going to be on the 23rd.

Dr. Larson: Mr. Leming, I can't guaranty that there will only be 4 people next time. I don't have that information.

Mr. Leming: I understand that. Does anybody know that they're not going to be here? I know vacations and things like that are planned. I know Mr. Ingalls can't participate, but we would like to…

Dr. Larson: Does anybody know that they will not be at the July meeting right now?

Mr. Poss: There's a possibility that I will not be here.

Dr. Larson: Okay. Anybody else?

Ms. Keith: Mr. Chair, we have three other cases in July. Two appeals and one special exception.

Mr. Leming: And I'm responsible for two of those appeals. There is a good possibility they'll get resolved.

Dr. Larson: We haven't advertised any of that, right?

Ms. Keith: Not at present.

Dr. Larson: Okay, maybe we can talk offline about maybe moving some of that around.

Mr. Leming: We could do that, or, my understanding from my client is that there's not any particular rush on this. I mean if you want to keep that agenda and move this to your August meeting, we can consider that too.

Dr. Larson: Let's settle on whether we're deferring first and then we'll figure out when we're deferring to.

Mr. Leming: Okay.

Dr. Larson: Does anybody else know for sure that they will not be here for the July meeting? What date was that?

Dr. Ackermann: 23rd.

Dr. Larson: 23rd. Okay, so far it looks like just one person knows they will not be here.

Mr. Leming: Right and then Mr. Ingalls won't participate. Well, I think, you're right that it is unpredictable and there are 6 of you here tonight. Another thing I was thinking, you've just been here for 2 hours, but I think it probably it makes sense for us to proceed tonight, since we really don't know that things are going to be any better and it looks like at least 2 regular members would not be able to participate so you only have a full BZA, both alternates are here and everybody else is able to come. So 6

is about as close as we're going to get for the summer. I apologize to bring you false hope and you think you're going to go home and then we change our mind.

Dr. Larson: Alright, would staff please read the next case?

Ms. Keith: Item number 3. Also, Mr. Chair, tonight you have Kathy Baker, Assistant Director of Planning & Zoning, to answer any questions you may have. The Property was purchased by the Stafford Lakes Business Park LP in May 1992 and rezoned by adoption of Ordinance O92-62. This ordinance was amended in April 1993 by adoption of Ordinance O92-62(R) (Attachment 4). In 2000, a vesting determination was requested for the Stafford Lakes Development, and at the time The Property was included in the determination (Attachment 5). In 2005, it was discovered that the inclusion of The Property was in error and a corrected letter was issued excluding the Property (Attachment 6). The Property has been part of a consolidation of parcels and is now identified as Tax Parcel 44R-5. A consolidation of parcels does not affect the zoning district or the property description of the rezoning action. Consequently, the property described in Ordinance O92-62(R) is subject to the action of the Board of Supervisor regardless of any consolidation or subdivision. In regards to the current appeal, a package of additional information concerning the Property was received by Staff on May 17, 2013 from the applicant (Attachment 7) The intent of the submittal was to provide supporting documentation for the vesting determination to be reconsidered since the Virginia Code Section 15.2-2311 provides for a determination by the Zoning Administrator to not be final until 60 days after the date of the decision (Attachment 8). Included in the information were expenses incurred by the applicant and questioning of whether the County Attorney was consulted on this matter. Staff reviewed the additional information and found that reconsidering the vesting determination was not warranted and the County Attorney has been consulted concerning all aspects of this vesting determination as permitted by Virginia Code Section 15.2-2307 (Attachment 9). Mr. Chair, I also want to mention that additional information was received on June 14, 2013 concerning this appeal. The bylaws of the Board of Zoning Appeals (BZA) allow additional information to be submitted for a pending case no later than 10 days prior to the hearing. Due to the volume of information in the package, staff was unable to review the material prior to the deadline for the packet delivery.

Dr. Larson: Yes, and as a footnote for the Board, Melody called me and we discussed that and I approved that…

Ms. Keith: We can move forward?

Dr. Larson: Yes, if the information is in the package.

Ms. Keith: Yes, it is. This is the staff response to Appeal Justification: 1. The rezoning of the property was a SAGA and approved a specific project for the Property. Staff response: The Virginia Code Section 15.2-2307 states a landowner's vested right in a land use is valid if the landowner obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing the development of a specific project. The Property is zoned B-2, Urban Commercial (formerly known as B-2, General Commercial) and is subject to Ordinance O92-62(R) with proffered conditions. The rezoning was approved on April 20, 1993 by the Board of Supervisors of Stafford County (see Attachment 4). The Property was rezoned from A-2, Rural Residential to B-2, General Commercial. The proffered conditions address many development standards for such items as the material for the buildings, parking lots, and signage. In addition, the proffered conditions also address the phasing construction in relationship to the adjacent Stafford Lakes Property. But no specified land use is cited in the rezoning case or in the proffered conditions for this property. The property is zoned B-2, Urban Commercial (formerly known as

B-2, General Commercial) and is vested to the adopted proffered conditions and the current uses and regulations in the B-2, General Commercial zoning district. This is the applicant: 2. Theatre Square has relied on the SAGA in good faith. Staff response: The reclassification of the Property could have been considered a Significant Affirmative Governmental Act but it did not specify a use for the property only that the Property be rezoned to B-2, General Commercial. In addition, there is no record of an approved preliminary or finale site plan, or a variance for this property and no record of a written order by the zoning administrator for this property. Therefore, the landowner has obtained approval for a rezoning of the property but a specific project or use was not stated and there is no basis for vesting a specific land use or project for the property. Applicant: 3. Theatre Square has incurred extensive obligations and substantial expenses in pursuit of the specific project in reliance on the SAGA. Response staff: Virginia Code Section 15.2-2307 (see Attachment 9) states one of the test for vesting of land use right is that if they incur extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act. Theatre Square submitted site plans SPR 210084 Stafford Lakes Village Commercial Retail Center Frontage Improvement and SPR 241716 Stafford Lakes Village Commercial Retail Center for review and approval in 2001 and 2004 respectively. Due to the applicant failing to meet deadlines for submitting requested information and not replying to requests to keep the files active, the site plans were not approved and were closed due to inactivity. Therefore, the requirement to diligently pursue a specific project was not met. The end, Mr. Chair.

Dr. Larson: Thank you. Any questions for staff?

Mr. Davis: On page 3 of 7, 4th paragraph, 7th line, you indicated that considering the vesting determination. I think we need to change to "reconsidering". It might make a difference. I think there was one other case where it shows "reconsideration".

Ms. Keith: Okay, thanks.

Mr. Apicella: Mr. Chair, it would be helpful to me and perhaps the rest of my colleagues on the Board to have us go back to the history one more time to understand what happened here. From the point of the original rezoning up to the point of the Zoning Administrator's most recent letter indicating that the property was not vested. So I don't know whether Kathy is the right person to do that or Jeff. Just so we're on the same page as to what the real history is here.

Dr. Larson: And along those lines it would be helpful for me and I think part of the case the staff is making is the files weren't kept current. The applicant was given the opportunity to update the use of the property. That wasn't done. Could you go over the rules for that, as far as vesting goes?

Mrs. Baker: I'm not sure I follow that question that you're specifically asking with regard to which files.

Dr. Larson: See the rules state something like: It has to be a significant Government Act, there has to be actions taken on part of the applicant, based on the significant Government Act to accomplish a project of some kind and there was a statement made earlier that that wasn't really done, that the applicant somehow to inquires or something like that.

Mrs. Baker: Again, I'm not sure specifically, but if you're talking about the three different tiers of how we determine the vesting and the third one being the diligent pursuit.

Dr. Larson: Yes, diligent.

Mrs. Baker: Is that the one that you're referring to? Hold on, my substantial notes here. Where do you all want me to start? Do you want me to go in chronological order?

Mr. Apicella: Again, it would help me chronologically to understand, because at one point there was indication this parcel was vested and then a subsequent determination that it wasn't vested. So again, if you could help walk us through the history as to a larger parcel, whether this was truly part of it or not part of it during the original rezoning, what made staff and the applicant think it was vested and then the determination that it wasn't vested…I'm just trying to connect the dots here.

Mrs. Baker: Okay, I'll speak on behalf of the staff's point of view that, yes, the original rezoning in 1989 was for a certain portion of this overall Stafford Lakes Development. It did not include the parcel that is the subject of this request. The parcel of this request is now referred to Assessor's parcel 44R-5. That parcel was originally three separate parcels that were consolidated at a different time, but I'm going to go back to the beginning of the 89 rezoning. That was for parcels outside of the subject parcel that we're referring to under this request. So in 1989 had proffers specific to – it included residential development, included some industrial development as well as commercial B-2 development. Then in May 1992 these three parcels, parcel 44-47A, 47B and 47C, to B-2. At the time it was a different - general commercial versus urban commercial, as it is specified now. That was also amended in 1993. So you did have two separate zoning cases. The 2000 vesting determination was not specific. It just referenced the zoning of the property. So in 2005 it was discovered that the property was…

Mr. Apicella: Kathy, one of the things I was trying to get was the actual letter from the applicant, the request that asked staff to respond to whether or not this parcel, or whatever parcels were vested. I see it disconnected, because I don't see the incoming letter from the applicant or his agent in 2000.

Mrs. Baker: And on December 5th of 2000 the letter that went to Mr. Shaia said "this is in response to your letter of October 19th, 2000".

Mr. Apicella: Do we have that letter from the applicant, or his agent. What did the letter say?

Mrs. Baker: Yes, we have it in our files, but I don't think that was included in the package.

Mr. Apicella: It was not.

Mrs. Baker: If you give me a minute, I will locate that.

Mr. Apicella: I mean there is a method to my madness. I'm curious about what specific question was asked and how the question was answered by the County and what led to the confusion at that point in time.

Mrs. Baker: Okay, so October 19th, 2000 letter was sent from Laurence T. Shaia. That's Mr. Shaia who is here this evening. Do you want me to read the letter? Do you want to look at the letter?

Mr. Apicella: Yes, I think we all would benefit from the content of that letter.

Dr. Larson: Please read it.

Mrs. Baker: Dear Mr. Shardain, this letter is to revise my determination request dated October 2nd for the vesting rights of Stafford Lakes Village. Due to the recent changes that the BOS made on October 3rd and

17th, I'm requesting a revision to my letter dated October 2nd to include the determination for the vesting rights of the zoning subdivision preliminary plat and density ordinances for Stafford Lakes Village. In my last letter I stated that Stafford Lakes Village has given the County of Stafford a significant amount of proffers. The County of Stafford has benefited from these proffers for some time. All the statements made in the October 2nd letter are still valid and have not changed. I'm requesting that the zoning subdivision preliminary plat and density for Stafford Lakes Village be vested so that the remaining lots can be developed under the terms and conditions set forth when the property was zoned and approved 1994. I hope that you will be able to respond before November 2nd.
Then I have the previous letter, dated October 6th, that he is referencing in this letter. So I have a whole chronology of letters, if you'd like me to continue reading.

Mr. Apicella: Again, I'm just curious. As I understand, the subject parcels are 47A, 47B, 47C and so it sounds like the letter from the applicant at that point in time wasn't necessarily clear that these specific parcels were included in their question. I'm trying to understand the disconnect as to why someone might have interpreted in the 2000 memo, the response from the County, that those parcels were vested.

Mrs. Baker: I mean looking at these letters, there are not specific parcels referenced in the request. I don't know at the time if those parcels where mentioned to the staff when the applicant came in. I can't answer that, but there is no reference to the actual parcel numbers, other than when it talks about the preliminary plan which would be for the residential portion of it. The current preliminary plan calls it development, excuse me, no, that's just dealing with the zoning of the lots R-1. They talk about sections, but there's no reference to the specific assessor's parcel.

Mr. Apicella: So again, a somewhat ambiguous request and a somewhat ambiguous answer. That part is not being clear about what was covered in the request.

Dr. Larson: I think the request was phrased for the Stafford Lakes Development and the answer was addressing the Stafford Lakes Development. I think that's what happened. So there was no – they didn't pull these three parcels out for specific discussion at that time.

Mrs. Baker: Not according to the documentation that we have.

Dr. Larson: And that's where the ambiguity arose, I think.

Mr. Apicella: I'm coming to the same conclusion. That's why I thought it was worth stopping at this point. I didn't mean to stop you, but just trying to understand what led to some potential confusion. If you don't mind carrying on.

Mrs. Baker: Now in 2005 I believe that the applicant did look at what he was going to do with the property. At that time it was discovered that the original letter did not include specific parcels and the letter should have, according to the Zoning Administrator, excluded the three subject parcels, because they were subject to a separate rezoning. It was actually dated 1/9/2006 which you all did have that letter in your package.

Mr. Apicella: So from a staff perspective does that mean that it's your conclusion then and now that those specific parcels were not vested, because they weren't covered?

Mrs. Baker: They were not covered with that original 1989 rezoning.

Mr. Apicella: Okay.

Mrs. Baker: So as far as the applications that were submitted, there were site plans that were submitted in 2001 and 2004. Both of those files were closed due to inactivity. They were submitted. They had staff review and according to our records there were never plans that were resubmitted. That's policy in our office, after a length of time that we do close these files, the one was closed in 2009 and the other one was closed in…Sorry, I don't have the date on that one, but the original one from 2001 was closed in 2009 and the second one was closed, but there was no date specific on that. There was a preliminary site plan that was submitted back in 1990, but that was showing office development. There were no specifics. We do not require preliminary site plans anymore, but at the time there was a preliminary site plan and then a follow up where the major site plan would have been submitted for actual buildings on the site. So just the preliminary site plan from 1990. So what else?

Mr. Apicella: So I'm going to go back to what happened in 2006 where the staff clarified by not including those parcels in its response that those were not vested. I assume the question was specifically asked about, again 47A, 47B and 47C, in the incoming to the County. Again, I don't have a copy of it, so I don't know what specific question was asked, but I'm making an assumption, maybe a false one, that it in some way covered those parcels. And the absence of including those specific parcels in the response would indicate that, again, those weren't covered in that letter.

Mrs. Baker: So the January 9th, 2006 letter was clarification of vesting determination of December 5th, 2000. This is the letter that was in your package. This letter is in response to your letter dated September 28th, 2005, amended November 3rd and November 16th, 2005, requesting clarification of my vesting determination of the above subject. I apologize, this is to Clark Leming from Daniel Shardain. He was the director of Code Administration at the time. The parcels that were originally rezoned in 1989 for commercial use were 44-46 (portion of), 44-48, 44-48A, 44-49, 44-50, 44-55A, 44-55B, 44-57, 44-58 and 44-62 and were part of my original zoning vesting determination of December 5th, 2000.

Mr. Apicella: Again, 47A, B and C weren't included in that.

Mrs. Baker: Were not included in this.

Mr. Apicella: And that would normally lead the person who received that letter to conclude that, again, those lots were not vested. I mean, it didn't specifically say, those parcels were not vested, but the mere fact that they weren't included, the question was asked and the question was answered. They weren't included. Would a normal, reasonable person conclude that these were not vested? That's part of the response?

Mrs. Baker: Yes.

Mr. Apicella: Okay.

Dr. Larson: So just a clarification on the diligent pursuit issue. The site plan…did you say the site plan was submitted in 2001?

Mrs. Baker: The first site plan, which was actually a site plan for just frontage improvements along Route 17.

Dr. Larson: Okay, that was in 2001?

Mrs. Baker: Yes.

Dr. Larson: And then there was not follow up to that?

Mrs. Baker: We had records of staff comments that were supplied to the applicant, but no plan was ever resubmitted back, based on those comments.

Dr. Larson: So then it was closed out in 2009?

Mrs. Baker: Yes.

Dr. Larson: So basically after 8 years, if there is no significant activity, it's the process to close it out?

Mrs. Baker: We actually look at it after 5 years. That was just the time of cleaning out our files at the time.

Dr. Larson: Okay, thank you. Any other questions for staff?

Mr. Apicella: I apologize, I do focus a lot on procedure and process. When this property was rezoned, I think you indicated in 92, with proffers, does that by itself lead to the vesting of the parcels?

Mrs. Baker: I'm not sure I quite understand your question.

Mr. Apicella: Okay, so there was a rezoning action by the County. This goes back to the significant SAGA issue. So back in 92 these specific parcels were rezoned with proffers. Does that by itself vest out those parcels?

Mrs. Baker: No, the vesting is a three tiered approach.

Mr. Apicella: I got you. I'm just trying to get it out there. And the applicant asked and the question was answered in 2006 as to whether or not those specific parcels were vested. At that point in time they asked the question and the question was answered in 2006 by this letter of response from the County.

Mrs. Baker: The letter of response in 2006 was confirming that the original vesting letter from 2000 did not include these three parcels.

Mr. Apicella: Again, I'm just trying to follow the history. So what I see now is a request to appeal a vesting decision. Was that not a vesting decision at that point in time? In 2006?

Mrs. Baker: Yes.

Mr. Apicella: They asked the question. They got an answer. Is there not a time limit for submitting an appeal? Because, again, the question was asked a second time, now, in 2013.

Mrs. Baker: I don't have the answer at this point without going back through this paper work to see what the time limit is. Right now it says under section 28-352 "Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any taxpayer or any officer, department, board or bureau of the county, may present to the circuit court…". I'm in the wrong section. That's the Circuit Court.

Mr. Apicella: I guess my point is, it's seven years later.

Mrs. Baker: And I don't have an answer to that without going through this.

Ms. Apicella: How many times do you get to ask and answer the question about whether or not you're vested? Now this is a second time asking the question of whether or not they're vested.

Mrs. Baker: Yes. I don't know the answer to that either without looking into that.

Mr. Apicella: Would anything have changed to give them a different answer in 2013 versus 2006 from the County's perspective.

Mrs. Baker: Well I believe that they've submitted some additional information that they thought was pertinent with regard to how much money they had spent.

Mr. Apicella: I'm asking from the County's perspective. What would you have required to have happened. So from the County's perspective it wasn't vested in 2006. What would have caused it to be vested between 2006 and now from the County's perspective?

Mrs. Baker: Nothing from our standpoint.

Mr. Apicella: And that's the fundamental issue that we're here to decide, right?

Mrs. Baker: I mean the inquiry came from the applicant as they were looking, I assume, to proceed with the development of the property. But I can't speak for the applicant.

Mr. Apicella: But they already asked that question in 2006 and they already got an answer in 2006. So this is now the second time, 7 years later, that they're asking the same question.

Mrs. Baker: And I can't speak to that from their standpoint and I will have to get back to you on the reason for and how we can be considering this six years later.

Mr. Apicella: Thank you.

Dr. Larson: Any other questions for staff? Okay, I'd like to open the public hearing in this case. The applicant or his representative, please come forward.

Mr. Leming: Good evening again and let me cut through a lot of this for you all. What happened in 2000 is that Mr. Shaia owned the remainder of the 1989 zoning. He did not own the property that is subject to this zoning, the subject to the vesting determination tonight. He purchased that in 2002 and at that time, if you look through the chronology, and I think those things are all included in your file, the 2000 vesting determination simply said Stafford Lakes Village and we'll back up in a moment and talk about why we think this is vested and why it goes back to the 1992 rezoning of the property that is subject to the appeal tonight. In 2005 we simply inquired whether or not those parcels were included in the vesting determination. This is my first involvement and that's why my letter of September 28th, 2005 goes to. And there are two subsequent letters and then finally, Mr. Shardain doesn't make a vesting determination. He simply indicates that the parcels that originally zoned in 1989 were part of my 2000 vesting determination. So the only thing we did was to seek clarification as to whether or not the parcels were included. This was not a vesting determination. He was not making a vesting determination that these

parcels were or were not vested. He was simply making a clarification that they were not included in his 2000 determination. And indeed they couldn't have been, because Mr. Shaia didn't own these parcels at that point in time. So I hope that that provides the clarification. And for what it's worth, if you look at his January 9th, 2006 letter, it is not a vesting determination and doesn't include the appeal tag that would be necessary for one, even if there were one. I think my letter is going to clarify what we're asking for, in fact, I say in my letter that we ask that you do not render a separate determination. The letters provide additional material for that. That never happened and all Mr. Shardain did, was to clarify his 2000 determination. Now vesting is something that some of you have considered before. It is brand new for at least a couple of you I think. Vesting is an equitable under common law, but has been codified by the State of Virginia under Virginia Code Section 15.2-2307 and Mrs. Baker's been alluding to the particular provisions that are incorporated at that Code section. The reason the BZA gets involved in vesting determinations is because in the early 90s the General Assembly gave Zoning Administrators the authority to make vesting determinations. Circuit Courts also have the authority to make vesting determinations and we could go directly to the Circuit Court to make a vesting determination. What happened in this particular instance is that Mr. Shaia had submitted another site plan application, seeking to move ahead with the co-development of these properties and we'll talk a little more specifically about that in a moment, but the 1992 property and what's left from the commercial bay from 1989 the original zoning which have all been consolidated in one tax map parcel. We'll go back and talk about the proffers in a moment too. In the context of that application process the issue arose whether or not the 1992 property was vested, because in reviewing the records, and I think this is correct, it was clear that Mr. Shardain did not include that in his 2000 vesting determination. He didn't say it wasn't vested, it just wasn't part of the exercise and it wasn't a part of the exercise in 2005 or 2006. That was just a clarification of what he intended in 2000. Staff advised Mr. Shaia that he needed to get a vesting determination. His engineers submitted it and Mr. Shaia authorized them to do so. The vesting determination was not a particularly complete one, as these things go, this has become a fairly complicated business and Mr. Shaia's engineer submitted the application and that's what led to the determination from Ms. Blackburn that the property in her view was not vested, because it didn't meet the prongs of the vesting test. So that is what's appealed, is that vesting determination and we did go back to Ms. Blackburn and told her why we thought it was vested and she maintained her original opinion. Now the cases that have come before the BZA go way back and we'll talk about some of those in some details. Some end up being appealed to the Circuit Court, some don't, some…I'm trying to decide. I don't recall in my experience a case that this Board has determined was not vested on an appeal from the Zoning Administrator…some of those have been appealed by the County that had gone to Circuit Court. On this particular property I think what is important is to keep in mind that we have a 1989 rezoning with proffers and this is what at time would have been a mixed use project. It included a commercial portion, a residential portion, even an industrial portion. We didn't have mixed use ordinances at that time, so they were all, what we call, Euclidean Zoning districts and each was drawn out a commercial land bay, a residential one, but they were tied together in several respects and you'll hear some language later about what a specific project is. That's why we believe this property was rezoned for a specific use, because it is all tied together and there are proffers from the original zoning that say "you can go this far with the commercial, with the residential and then you have to do this much commercial". There are architectural standards that run with the proffers. Stafford Lakes is largely built out. How many homes do you still have to build there?

Mr. Shaia: I'm not sure.

Mr. Leming: There are some homes still left to be built in Stafford Lakes. Geico was part of the original Stafford Lakes zoning. That was the first commercial component. Walmart is part of it. So this was a large zoning. It is largely built out. There is a commercial land bay that still exists, that has not been built

out. In 1992 the owners of Stafford Lakes, not Mr. Shaia, but his predecessors, acquired another, I think it's 5.34 acres, and Kathy, do you have the application for the staff report in your file, for the 1992 application?

Mrs. Baker: Yes.

Mr. Leming: If you could pull that. I think that might be instructive. It's something I've come in and looked at some time ago. Now this is not part of your package; in 1992 there was an application made by the then owners of the rest of Stafford Lakes. There were a new set of proffers that ran with that and the proffers were integrated with the 1989 proffers. The same architectural standards were applied, the same phasing was applied so that the new commercial land bay would be tied to the residential build out and become part of the calculation that would be utilized for the overall development. The staff report, if Kathy put her finger on it, the application says on its face that the purpose of the 1992 zoning was to integrate that property into Stafford Lakes Village, the commercial village. The staff report makes reference to the same thing. Were you able to find it?

Mrs. Baker: It's upstairs. I can have someone go get it.

Mr. Leming: I think it's important that you all have a look at that, because that was the intend and that is what the staff report indicated and the proffers indicate and reflect the integration between the two developments. Now the ownership states separate and Mr. Shaia purchased the remainder of Stafford Lakes Village, the 1989 property, but not until 2003 or 2004 did he acquire the property that went with the 1992 zoning. So those properties have now been consolidated. They are all under one tax map parcel and what occurred in 2004 was an effort to develop all that entire property. The material that we submitted on July 14th, after an exhaustive effort, is a very thick collection of documents that show all the work that's been done on the property and we'll talk about the significance of that and why we think that that meets the prong of the test. So that is the background. We have a 89 zoning. We have a 1992 commercial zoning, an integration of the two. We have cross proffers. The 1992 zoning was never intended to be a standalone zoning, but part of the 1989 zoning and indeed it was actually included within the calculations for the phasing. Now onto vesting. There is a three part vesting test that is set up by state law and indeed that's what the Zoning Administrator walks through in her determination and deciding in her opinion that the property, that is the 1992 property, even though it's tied to the 1989 property, is not vested, which is in and of itself curious, because in 2000, based on the same kinds of evidence, the Zoning Administrator found that the rest of Stafford Lakes Village was vested. These parcels, as we've discussed a moment ago, these parcels were not part of Mr. Shaia's ensemble, collection of properties at that point, but they became so in 2003. Never the less, in 2000 the Zoning Administrator decided, based on the proffers, there was a SAGA, which is inconsistent with what Ms. Blackburn decided, because they're the same proffers that cover both of them and we'll talk about which prong it is that there was reliance on that SAGA and Mr. Shardain determined that there were significant expenses and obligations, meeting all three prongs of the vesting test for the 1989 property. So we have this little side piece of property that is coordinated and integrated with the 1989 property, but Ms. Blackburn now says, it's not vested. So, same development, even the same tax map parcel, all came in under the same site plan application for the development of all of this commercial and yet the earlier property is not vested, the new property is. The old property is vested the new property is not. Both properties have been subject to the calculations under the proffer for the residential build out. This is how far you go with the commercial before you do something with the residential. Now, under the vesting test, the first prong is that the property owner is the beneficiary of a significant affirmative governmental act which remains in effect allowing the development of a specific project. Now that is what we call a SAGA. Now, Ms. Blackburn says we don't have a SAGA here. The statue lists seven different SAGAs that are on their face significant affirmative

governmental acts. There other's that they can't be, but we don't have to worry about that in this particular case. The first two that are listed at 2307 are what are at issue here. Number 1, the governing body has accepted proffers or proffered conditions which specify use relating to a zoning amendment. Now any time a zoning is adapted there is a zoning amendment. The zoning ordinance is actually amended every time the County adopts a rezoning. That rezoning and all the proffers that go with it become part of the zoning ordinance. So in 1989 and in 1992 the Board amended its zoning ordinance and in both of those cases there were proffers, there were significant proffers and those proffers are part of your package that went with the 1989 zoning and the 1992 zoning and they both have been adjusted a couple of times since then, but they pretty much have retained their original form and shape and requirement. The argument that Ms. Blackburn makes is that there is nothing in the proffers that indicates that there is a specified use. Well the proffers on their face talk about the residential portion of the development, the commercial part of the development, the architectural standards, the relationship between the commercial and the residential. I'm hard-pressed to think of any greater degree of specificity that are typically used in proffers to describe what a project is going to be. That's how you tie it down. The Virginia Supreme Court decided a case called Suffolk City and addressed that subject a few years ago and I included in my brief what it was that the Court said. And it's pretty straight forward. In this case the Court said: "The record reflects…" – this was talking about that particular case – "that the zoning was specifically directed to an identifiable property" – which this one obviously is. All the tax map parcels are spelled out in both, the 89 and the 92, zonings. In this particular case you have mixed use project. Residential, commercial, industrial, a connection between the two, architectural standards and in this particular case, a lot of that project is actually there. Stafford Lakes residential, I assume, is about ¾ built out. Stafford Lakes commercial features Geico, Walmart. What are the other significant?

Mr. Shaia: The extended stay hotel and a daycare center.

Mr. Leming: Hotel, daycare…so a sizeable amount of the commercial is already on the ground. That's the project. It's there. You can go and look at it. So if there's any question about that…Kathy, did you find that material?

Mrs. Baker: That is the one missing file, but I, yes, when I reviewed that file the application intended that the three parcels were going to be incorporated into the overall development, but there were still separate proffers that were associated with the three subject parcels that were different from the overall property.

Mr. Leming: There were two sets of proffers. The key is the integration between the proffers and the cross references between the proffers. And that included the phasing, as I indicated a moment ago. So I think the intent was to marry the two properties in 1992 so that they could be developed together. Otherwise there was really not much point to the 5.32 acres and my recollection is not only does the application say that on the face, but so does the staff report. The independent of the fact that we have this curious situation where we have this attempt to marry those two properties together, on its own what we have in 1992 is a…meets the requirements of the first SAGA here. We still have a rezoning with proffers for a specific project. What is the specific project? It's part of Stafford Lakes Village. It says that right on the face of the application. The proffers implement that. The proffers integrate it in with the rest of Stafford Lakes Village. So it can't be developed separately. They related to the residential portion of Stafford Lakes so that you have to do a certain amount of commercial before you can do the residential Stafford Lakes. So the integration is still the key there and that is clear on the face of the proffers which, if there's any doubt about that, I think you should look at them in detail. So the identifiable property and project is the standard of the Virginia Supreme Court for a specific project and I would remind, most of you were here for the vesting case that came up a couple of years ago called Chesapeake Stafford. This had to do with the office park that is right off of Courthouse Road out here and there were three parcels in

that development that were undeveloped that belonged to my client. They had been recorded. They have gone to final plat and the same issue was raised in that case: Well what is the specific project? Well, the specific project was the Office Park, the industrial development that was already there. Most of it was already on the ground. That's what the preliminary plan set for it. Office Park, that's as specific as it got and there were no proffers that went with that. The BZA determined that that was a specific project, anonymously as a matter of fact and that decision was upheld by the Circuit Court of Stafford County. It was appealed to the Virginia Supreme Court. The appeal was rejected by the Virginia Supreme Court. So when we're talking about a specific project, that's as general as you have to get. You all have done it before. The Virginia Supreme Court has said: It doesn't have to be anything more complicated than an identifiable property and project. Now there's a second SAGA. This is the next one: The governing body has approved an application for a rezoning for a specific use or density. Now in this particular case – same argument – there is a specific use. It's spelled out in the proffers in the concept of the total, the combination of the 89 and the 92 proffers very clearly describe a specific use for these properties. Even in the context of the 1992 proffers there is a specific use that is described. It's clearly a part of a commercial project to be tied in to Stafford Lakes Village. That's what it was presented as. That's what staff presented it as. That's what the proffers indicate that it is. So either of those qualify as the SAGA in this particular case. You have a significant affirmative governmental act. Now the second prong of the test is reliance and that prong simply states – this is the easiest prong that is made in these cases – relies in good faith on the significant affirmative governmental act. But what do you have to do? Just about anything that you do to try to implement the project is in good faith reliance on that significant affirmative governmental act. If we sat around and did nothing, we wouldn't be here talking about this at all, but if you assume that the governmental act is valid and you can move ahead with it, then you've relied on that act and that's really as simple as that particular prong is. The only thing that Ms. Blackburn says about that is, well, since there's no SAGA there couldn't have been any reliance on it. So, there was a SAGA and there was reliance on it and the reliance is spelled out, I think, more thoroughly under the third prong. Under the third prong of the vesting test the applicant incurs extensive obligations or substantial expenses in diligent pursuit of the specific project. We've talked about the specific project in reliance of the significant affirmative governmental act. Now what do you have to do? What do you have to do to get to the point to meet this prong? What kind of pursuit is actually required under the case law? You all have had some cases on this very subject. One of the first vesting places that came along after the statue came into effect, was one called the Dogwoods case. I think that probably Mr. Ingalls was the only one on the Board at that time. That was a case where you had a 1989 zoning with proffers, you had a preliminary subdivision plan that was approved but then expired and then a significant period of inactivity. The inactivity extended all the way to 2000, which is when the case came forward. The BZA ruled that that activity that occurred after the zoning was sufficient to vest the project. That was in diligent pursuit of the project. They did try to move ahead with it. All kinds of things obviously affect the success of a project, but they did try to move ahead with it. The BZA determined that it was vested and that they had diligently pursued the project. The Circuit Court upheld that decision. That is as far as that went. The County appealed that. Now, in addition, if we go back to the Suffolk City case, we have almost the opposite effect. And in Suffolk City we have a 1992, I'm sorry, a 1989 zoning and a period of almost no activity. We had an application in Suffolk City for a subdivision plan, but not an approval of a subdivision plan. That's as far as it went. And then Suffolk City changed the zoning ordinance. And the Supreme Court found that the expenditures in that case, which amounted to, I think I have it in my memo, I think it was about $135,000, was sufficient to vest that particular property for purposes of the third prong of the test. In other cases – in the Dogwoods case – the expenditures were even less. In the Dogwoods case the expenditures were only about $20,000. Development cost, I guess, being substantial lower in the early 90s. But that was found to be sufficient to vest. In Salem Field, which is a case out of Spotsylvania County, the expenses amounted to a little over $38,000 and in that case there was simply a subdivision plat. And the case that was most recent here, in the Chesapeake Stafford case, in that case the total expenses, including a bond, were

almost $35,000 in that particular case and that was sufficient to meet the third prong of the test. Both, as far as this BZA was concerned and the Circuit was concerned. In our case the documentation that I have provided to you, and I realize it's a lot of material, amounts to nearly $165,000. Now these are moneys that were spent in recent history, not money that goes all the way back to the beginning of the development, not money spent on Geico, but since Mr. Shaia has been in control of the propery. These expenses have been spent on the entire commercial development. There's been a storm water management plan that has been approved by the County. So there is that particular approval. The expenses go to the entire commercial land bay. What's left from 1989 plus what came in in 1992. It's all one tax map parcel now, being developed together. Now because of some offsite expenses, specifically some improvements to route 17, Mr. Shaia decided not to go forward with the project in 2004. I think he stopped about 2006 and of course then we have the economy issue. So the issue is at this point, whether or not they have gone far enough with their expenses in order to meet the third prong of the test. And based on all of the case law, based on all of your decisions there is no question that they've gone far enough to meet the third prong of the test. Now that's why we think the project is vested. In addition to the anomaly of having the entire rest of the project being determined to be vested by the zoning administrator in 2000, this particular acreage was intended to be merged in with the 1989 acreage. That is accomplished through the proffers in 1992. You also see it through the development pattern that covers later when Mr. Shaia comes into possession of the property. We have not one, but two potential significant affirmative governmental acts here. Clearly we have a zoning with proffers for a specific project. There can't be any question about what the project is at this point, because it's on the ground. Just as was the case when the Stafford Chesapeake project was before this body just a couple of years ago.

Dr. Larson: Mr. Leming? Excuse me. I'm told that you have been speaking for more than 15 minutes at this late hour. Could you wrap it?

Mr. Leming: This is my conclusion. I was wondering what that note was you were passing around. I will bring it to a conclusion. I am just summarizing. If there's a SAGA and they do anything, there is reliance on the SAGA and then with the question of expenses, you have the entire package of expenses that have been spent on this property and the adjacent commercial land bay. All of which is being developed together. Now of course they've come forward again and have incurred additional expenses. The site plan that they have recently submitted is about 50% complete. So there are substantial expenses even associated with the most recent effort which occurred a couple of years ago. And one final point that I would make, Ms. Blackburn also says: well there's not approved site plan. There's no requirement that there be an approved site plan to meet the third prong of the test. A site plan is another significant affirmative governmental act. It's number 4 on the list of SAGAs. I don't have to have 2 SAGAs to be vested. All I have to do is pursuit the project in good faith reliance on the SAGA. There is not requirement that there be other approvals. There was an approval. There was a storm water plan, but there is no requirement whatsoever that there be a site plan approval in order to be vested for a project. And I don't think you will find that in any other case and particularly in Suffolk City where you didn't have an approved subdivision plan. Alright, I'm sorry. I've worn out my welcome.

Dr. Larson: Thank you, Mr. Leming. Are there any questions for Mr. Leming? I have a quick one for the staff before you depart, Mr. Leming. I'm looking at the ordinance the Board of Supervisors passed in April of 92 and it refers to, I think, 47 and 47A. Yes, parcels 44-47 and 47A. Are those now the 3 parcels that we're talking about?

Mrs. Baker: Yes.

Dr. Larson: Okay. In the same ordinance there is a major heading called underlined inclusion of a

Stafford Lakes property and the first paragraph says: all building area constructed on the property shall be included in the calculations for phasing of residential and non-residential construction as set forth in paragraph C7 of the proffer statement applicable to the balance of the Stafford Lakes property. Which I'm assuming is what you're saying, Mr. Leming.

Mr. Leming: Exactly.

Dr. Larson: The ordinance goes on to requires a lot of things: the applicant shall phase the construction of the non-residential portions of the property and parcel A with residential portion according to the following schedule. And it has A, B, C, D, E, F, G. Do you know if any of those things were done, Mr. Leming?

Mr. Leming: I'm going to let Mr. Shaia address this specifically, but I think just about everything has been done here.

Mr. Shaia: Hi, my name is Lawrence Shaia. I represent Theatre Square.

Mr. Leming: What these go to are square footages that must occur commercially before residentially. He couldn't proceed with his residential development if certain commercial thresh holds had not been met here. Do you know how many square feet of commercial you … of course Geico counted initially.

Mr. Shaia: Geico took up a lot of these commercial requirements when Geico came in and yes, all of this: A, B, C, D, E, F…we've got more than 450,000 square feet of non-residential right now. I believe the Walmart is 250,000 square feet and so that with the Geico in itself is well over 450,000 square feet.

Mr. Leming: If the calculations didn't work out, then when he came in for a building permit, if he had to comply then theoretically what would happen is, staff would say you have to stop here until there's additional commercial that would have to be constructed. So that's the way that would work.

Dr. Larson: Okay, thank you. Any other questions for Mr. Leming or Mr. Shaia?

Mr. Apicella: I guess that's the fundamental issue I'm trying to discern here. What do you gain by having the parcel vested? What do you lose by having it not vested? Is that the fundamental?

Mr. Leming: Right. What it comes down to is the ordinance that applies. Because the original 1989 zoning is vested then the zoning ordinance that applies to that is the ordinance that was in effect at that time. What vesting does and what it says on the face of the statue: the purpose of vesting to protect the property owner from subsequent changes to the zoning ordinance. The position he's in right now is that part of his commercial land bay falls under the old standards, part of it falls under the new standards, at least according to Ms. Blackburn, because that 5.34 acres is not vested. If it's vested then he goes back to the goes back to the ordinance that was in effect in 1992 which means that all the property is developed under one ordinance whether or not there were two separate ordinances. So that's exactly what it does.

Dr. Larson: Any other questions?

Mr. Apicella: I have questions for staff. So I'm looking at the actual code section. Seems to me that the fundamental issue here is whether or not this is a specific project. So help me understand from your vantage point how it's not a specific project, especially when I look at the second paragraph for the purpose of the section "without limitation the following ordained to be significant affirmative

governmental act allowing the development of a specific project. The governing body has accepted proffers or proffer conditions which specify use related to a zoning amendment." So that's number 1 under that paragraph. Number 2: "The governing body has approved an application for a rezoning for a specific use or density". So I'm trying to understand from your vantage point how this would not apply in this instance.

Mrs. Baker: I think what you said about being a specific project is what's not applying, because they rezoned those 3 parcels in 1992 and yes, it was anticipated that the commercial development was going to go on the property. There was no specific commercial development specified on these 3 parcels. There's not site plan that was submitted showing development of a 50,000 square foot office building, or whatever, on this specific parcel, so we don't have anything that is showing a specific project on this parcel. So that's why, although yes, they had a rezoning of the property. They can go out today and build something under the B-2 zoning, but they never proposed an actual site plan on this parcel that we're counting as the specific project.

Mr. Apicella: So merely being rezoned a commercial does not, in your opinion, reach the thresh hold level of being a specific project. Some specific building activity would have had to have been followed up on to designate it as a specific project. Is that kind of what you're saying?

Mrs. Baker: Correct. It's typically when we have a rezoning application come in, we see a specific – here's a 5,000 square foot building that's going to go on this property, here's a generalized development plan that's showing that – and that did not occur in the eyes of the zoning administrator.

Dr. Larson: So the parcels in question, however they're parced, A, B and C, 44-47; the 3 parcels we're talking about, are they zoned B-2 now?

Mrs. Baker: Yes, they were rezoned in 92/93 to B-2.

Dr. Larson: I guess I'm circling back to what you asked. I'm trying to understand why the applicant just can't use it. Just build on it.

Mrs. Baker: I'd have to let the applicant answer that. We say they can build it under B-2, under today's current B-2 standards.

Mr. Leming: What they're saying we can't do is to apply the 1992 ordinance. Now Mr. Shaia can tell you specifically what difference that makes, but the other important point here is that there is no case law whatsoever supporting the County's position. Everything just to the contrary in fact. If you have a zoning with proffers, it's the proffers that define the project. It's the proffers that define the use, not what you cover with the site plan, it's the proffers. And all of the case law indicates exactly that including the Supreme Court case here which is Suffolk City and in the case that you all decided a couple of years ago, the business park back here, industrial park. There was nothing on the ground. There was no site plan.

Mr. Shaia: Specifically there are a couple of items, one of them being drive-throughs – the Highway Overlay District, you would have to get a special use permit or conditional use permit to get a drive-through. Where we feel the drive-through is very important as part of the zoning and we feel we shouldn't have to go to another step to get something of that nature. In addition, you know, all the proffers that Stafford Lakes has provided for the County, i. e. Rocky Pen Elementary School, Library Site, Fire Rescue Site, Mary Washington Campus. Yes that was a proffered condition. All those proffered conditions had been met. We've met, I want to say, if not all the proffered conditions, 99.9%. There might be one

entrance way back, in the very back that might not be in yet, but aside from that all the proffered conditions have been met. The regional ponds and all that. So this property, and I don't know if you have the map, but basically it was like a tooth surrounded by Stafford Lakes and Route 17. So 17 is down here. We had 3 parcels and parcel 5 really surrounded it. And when they purchased these 3 parcels in 1992 and went for zoning, obviously it was on all sides by Stafford Lakes Village except for Route 17. And aside from one or two proffered conditions that were different, everything else was the same. So we couldn't develop any more residential unless we had the commercial. Well, I've never seen a rezoning where you can have a parcel all by itself and asking somebody else to develop something before you can develop your parcel. That's why it was molded together. And so it should be a part…and we're not asking for the 1989 vesting. We're asking for the 1992 or 1993 vesting. So we'll go back to that and that's fine with us, but again, all the proffered conditions for Stafford Lakes Village, including these 3 properties have been met and the benefit has been to all that are part of Stafford Lakes. Rocky Pen, the Library Site, regional ponds, Mary Washington, all the road systems. We even have a Fire and Rescue Site on the property, that we've given to the County. Thank you very much.

Dr. Larson: Any other questions for the applicant or Mr. Leming? Okay, thank you. I don't think there are members of the public present, so I'll close the hearing if there are no further questions for the applicant or staff and would somebody like to make a motion, or do we need more information?

Mr. Apicella: I actually think we do need more information, because there is a big disconnect between what the staff thinks is a specific project and what the applicant thinks is a specific project and to me, both in terms of the case that Mr. Leming presented to us and then the actual language in the Code, the driver is specific project and I'm not sure who to give more weight to in defining what a specific project is at this point in time. That's my personal view, but that seems to be the thrash hold that has to be met for the SAGA. If somebody could give us some other additional cases, because even that Suffolk case mentions the word specific project. So the proffers derive from that specific project. I'm just having a hard time deciding whether or not this specific broad rezoning to a commercial use is or is not within that boundary.

Dr. Ackermann: Is there something specific, some information or some document that you think would help you with that?

Mr. Apicella: I don't know. Maybe there's an additional case law that defines what a specific project is.

Dr. Larson: We were given a lot of material in this case, but I think most of it was expense related.

Mr. Leming: Most of the material was documentation of the expenses which was to the third prong. Now the cases of the citations on vesting are all included in my brief. I'm not aware of any other cases, but you could certainly get copies of these cases.

Dr. Larson: Well if we need to have more time, that's fine, we can take more time. If the Board thinks that they haven't had enough time to review the material that we've been given, or that we need more time to review material that we haven't been given, that's fine, but I think I'd like to know what we need the time for.

Mr. Apicella: I'm just reading, and I believe it's Mr. Leming's summary, I don't know if it's the actual language from the case or not, it says "for the City of Suffolk the Supreme Court addressed a specific project requirement and found a specific project to be sufficient when the rezoning was directed to an identified property and project." It still goes back to what is a project and Mr. Leming contends it's the overall zoning to commercial and associated proffers. I'm not necessarily reading that here. I'm trying to

give some benefit of the doubt. If somebody can proof, with further information, that merely having zoning to a general category with proffers associated with that generalized commercial category is sufficient to reach the specific property thresh hold.

Dr. Ackermann: So, from reading of the documents, the County Attorney was asked for some counsel and essentially making a decision. Is that correct?

Mr. Grimes: I read it as the Attorney was counted only on whether or not those parcels were included.

Dr. Ackermann: I see. And then the County Attorney, his opinion was that they were not included evidently, right?

Mr. Grimes: I would agree with that.

Mr. Davis: Can we hear one more time, what the difference is and what the zoning allowed before and what it would allow now and what the request is? What's going to change? What is the "vested" going to change from what he can do now? All we heard was something about a drive-through. What difference does that make in the zoning? Is there a difference?

Mrs. Baker: Are you asking me or you're asking the applicant?

Mr. Davis: I'm asking you.

Mrs. Baker: I mean I have a list of things that would have been allowed at the time versus a list of what's allowed today. Many of them are similar, but what the applicant pointed out was the capability to have drive-through facilities without a conditional use permit. That's required now that the Highway Corridor Overlay is in place in the Route 17 corridor, any drive-through facility requires to go through that stuff to get a conditional use permit as opposed to being able to do it by right before the 1995 Highway Corridor.

Mr. Davis: Thank you.

Mr. Poss: When you say a drive-through facility, are you talking something like a fast food restaurant?

Mrs. Baker: Yes. Fast food, banks, CVS pharmacy – some the pharmacies have drive-throughs now.

Mr. Poss: Do we know at this time what the specific project is?

Mrs. Baker: I do not. We've not seen any plans for any project proposed. I'm not sure if they've had discussions with any other staff member.

Mr. Poss: Can we get an answer from the builder, if they have a specific project in mind right now?

Mr. Shaia: I thought maybe it would be in your package, but I guess it's not. We have several buildings with a couple of drive-throughs and we've hired an architect, we have really nice elevations. To me it's stunning. It really looks good, but one of them is a larger piece of real estate that is like a CVS with a drive-through. The other one is more like a Starbucks. That's what I envisioned being there with a drive-through. And so that's what we propose and I can get you all the layout and the elevations, if you so choose.

Mr. Davis: Is the entrance right off of 17?

Mr. Shaia: Actually no. We did propose that originally, but staff has said that we were not allowed to put an entrance on 17, so the plan hadn't changed. It does show right in/right out on 17, but that's going to be erased, because that is one of the one things that was changed in the zoning in 1992 that I wasn't aware of, that were are not allowed to have access on 17, so it would go around Stafford Lakes Parkway and then come in from the back side. But that would be a change to what the engineer had already drawn. We just seized fire when the staff started making comments, or just verbal comments saying "you can't do this and you can't have a drive-through" and I'm like "wait a second, everybody has drive-throughs", but this is where we're at.

Mr. Apicella: Well you can have a drive-through, you just have to go through the CUP process.

Mr. Shaia: Yes, if we were even allowed to obtain it. I'm not sure we would be allowed to get it. It all depends on the conditional permit.

Dr. Larson: I think the applicant has a legitimate application. I mean that would be another venue, but I think he has a legitimate application for this Board. In view of the lack of a motion and in view of the volume of material we had for this case and in view of the historically complicated nature of vesting cases anyway, I think we're going to have to postpone a decision on this one until next time.

Mr. Leming: You all are not going to be here next time.

Dr. Larson: I think one of us won't be. One of us potentially won't.

Mr. Leming: What I would ask for is that we reconvene with the members that heard the case to make a decision on the case, rather than missing members, because we're down to six now, or bring in somebody else that hasn't heard the case.

Dr. Larson: I agree with that. I think it's reasonable. I think in the interim that the Board needs to go back and research the package and review your notes and what was said and in particular I think the question Mr. Apicella brought up is a good one, about the specific project, what are the implications for that or is there a specific project here, and if the three tiers of vesting have been met.

Mr. Poss: I will do whatever I need to do to be here for the next meeting.

Dr. Larson: So do we need a motion to postpone consideration of this, or…?

Mr. Apicella: So moved, Mr. Chairman.

Dr. Larson: Is there a second?

Mr. Poss: Second.

Dr. Larson: All those in favor say aye and what we're doing is postponing until the next time, unless not all of us can be present. So we're postponing to when we can be present, but we're assuming that it's next time. Those in favor?

Mr. Apicella: Aye.

Mr. Davis: Aye.

Mr. Poss: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye. Any opposed?

Mr. Grimes: Nay.

Dr. Ackermann: Nay.

Dr. Larson: Okay, you opposed. Do you want to propose a motion then?

Dr. Ackermann: No, doesn't your motion carry?

Dr. Larson: Yes.

Dr. Ackermann: So there you go. I think that we should make a decision, but it appears that most folks feel that they don't have enough information to make a decision. I mean if I proposed a motion, I doubt that we get resolution of it.

Dr. Larson: Yes.

Mr. Davis: I would like to change my vote to "no".

Dr. Larson: Alright, that motion doesn't carry.

Mr. Davis: I would like to offer a motion.

Dr. Larson: Please.

Mr. Davis: (Inaudible - microphone not on).

Mr. Apicella: I'd like to offer a substitute motion, which is to deny the appeal.

Mr. Davis: (Inaudible - microphone not on).

Dr. Larson: Is there a second to the motion to approve?

Mr. Grimes: I would second to approve it.

Mr. Apicella: Mr. Chairman, I think the protocol is that the substitute motion goes before the original motion. It may not have been seconded, so it may be moved, but you didn't ask for a second.

Dr. Larson: Sorry. Is there a second to the substitute motion? Okay. Hearing none, there was a second to the original motion. Is there discussion on the original motion?

Mr. Grimes: I agree that project is not specifically defined as we may think of it quite often as. It's a bank. It's an office building. There are, based on the 89 and the follow up Planning Commission or Zoning Board's document… the ordinance that was issued in 89 and then revised in 92. They gave specific proffers for the properties, mentioned the properties in question by their reference number, and to date the development has complied with those proffers which would mean, the project has moved forward in whatever it is, residential and office. We've heard that the office development has met the square foot requirements proffered. That is a project in my mind. That is a project that moved forward based on the proffered requirements for the entire development. Thus my second of approving the appeal.

Dr. Larson: Any other comments?

Mr. Poss: Just to clarify. If we approve this motion, basically they would have to adhere to the 92 code?

Dr. Larson: I think the answer is yes to that question.

Mr. Poss: Okay. So they will have to adhere to the 92 code at that point. If this is approved, what will they then have to do to get approved to move forward with the project? Will there be any further County scrutiny at that point?

Mrs. Baker: They need to submit plans first. We haven't had any plans submitted at this time.

Dr. Larson: Any other discussion?

Mr. Apicella: Mr. Chairman, the reason why I did not support this motion is because 1. I don't think we have enough information yet on what is a specific project, notwithstanding what my colleague said previously. What I heard is, the proffers are largely a result of everything else around these specific parcels, not this specific property and there was no specific project identified up to this point, that the staff is aware of, that would fit the parameters of a specific project on these three parcels. And that's why I think the problem exists and why the staff at least thinks that there is not a specific project and why the fundamental thresh hold has not yet been made for vesting. So I think we're potentially redefining what a specific project is and making it far more broader than I think may currently exist. I appreciate that the applicant has counsel, and a good one, but I also think we have to rely on the advice and assistance of the staff who do this on a daily basis and if they don't think it's a specific project and it hasn't met the thrash hold, then I have to give some deference to the people who are professionals. The next one that comes in would probably say the same thing, that this is not a specific project. So I'm concerned about this panel approving something that doesn't meet the thrash hold. At least I have not yet been convinced that it meets the thrash hold and the standards for vesting.

Dr. Larson: I thought I saw somewhere proffers associated with the three parcels in question. Does anybody else remember seeing that?

Mrs. Baker: There are separate proffers that are associated with the three parcels. They are separate. I know that the contention is, it was intended that they be rolled in to the overall Stafford Lakes Development, but the Zoning Administrator still sees two separate sets of proffers. Just because the parcels were consolidated does not take away the original boundaries of those three parcels that were rezoned in 1992, separate, after the fact from the original 1989 rezoning. So the two sets of proffers that you have in your package are the two sets of proffers that the Zoning Administrator is saying, apply to each separate rezoning application that occurred. Yes, there were attempts to marry the two sets of proffers, so that when the overall development occurred, it would be, for instance, architectural

compatible, but if you look in the ordinance O92-62R, there is no specific mention within these proffers that are the three individual parcels that tells what the use is. It talks about architecture and building materials, that it will be compatible with the balance of Stafford Lakes Business Park. The balance of Stafford Lakes Business Park, the part of the 1989 rezoning. It talks about the signage, parking lot landscaping, lighting, buffering. There is the second section that talks about inclusion with Stafford Lakes Property. All the building area constructed on the property shall be included in the calculations for phasing of residential and non-residential construction. Set forth in the in the proffer statement applicable to the balance of the Stafford Lakes Property, referring to rezoning RC9215. But while they are intended to incorporate things, such as the phasing, they are still considering these standalone proffers for those three individual parcels. Just because the boundaries were consolidated did not take away that these are to apply to those original boundaries.

Mr. Leming: In response to that, what you have is a set of proffers. If these proffers don't constitute a specific project, I don't know what would. These projects are clearly directed at a commercial project. They get in and of themselves, even not looking at the inner relation between the two and the subheading that you got into previously about the phasing and the inclusion with the Stafford Lakes property. This all becomes part of one zoning ordinance. The conceptual error here is, I think, is to look at these as two separate sets of proffers. They're all part of the Stafford County Zoning Ordinance and they're all to be read together. Proffers, when they're adopted, become part of the ordinance. So 92 is just as much part of the ordinance as 89 is. These proffers, but even the standalone proffers, cover signage, lighting, buffering, screening, architecture, transportation, historic surveys. How can in the interrelation with the rest of Stafford Lakes Development the concession by staff and their staff report that the whole intend of this is to incorporate these parcels within Stafford Lakes Commercial Village. That's the intent, that's what they say it is. That's what we say it is. To come back now and say somehow this is separate in a part, nobody knows what this is going to be is disingenuous. What this comes down to is a project that is 9/10, if not more, built out. You know what it is. There is a commercial bay that is left, that has been integrated. It is part of one whole. He's trying to submit a site plan for the whole… he spent money on the whole that includes both sums of the parks. But there is absolutely no authority for the position that the Zoning Administrator has taken in any case law. You haven't been presented with any, on what a specific project is. The Supreme Court has looked at more general instances than this. You all have looked at more general instances than this. You said a project was vested right over here that had nothing on the three parcels that were the subject of the vesting. There was nothing there. There was simply a final subdivision plat that had been recorded. That was it. So if this isn't a specific project, if you can't name and describe a specific project with proffers, I don't think anything would qualify as a specific project. Now they want you to say, well it's not specific until we know exactly what's going to be on the ground. But that's not the intent. That's not the intent of the vesting statue. Intent of the vesting statue is to put the property owner in a position where they can move ahead and finish a project that they've started and there's no better example than what you have right now. Stafford Lakes is almost done. And this is to be part of Stafford Lakes Village. They want to treat it separately. I don't think there is any question about it being a specific project. And I do think it's disingenuous at this point and this development to try to say that it's not a specific project.

Dr. Larson: Any other questions or discussion? There is a motion on the floor. It was seconded. Any other discussion on the motion?

Mr. Poss: Could you clarify the motion please?

Dr. Larson: Staff, do you have the motion?

Ms. Keith: The motion is to… is this the one to postpone? Is this the one to approve? The motion is for… Mr. Davis's motion to approve the appeal and Mr. Grimes second.

Dr. Larson: Right, so that would mean that we would be voting against the Zoning Administrator's vesting decision and basically saying that the property is vested. That would be the meaning of the motion. I'm going to call for the question. All those in favor say aye.

Mr. Davis: Aye.

Mr. Poss: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye. Any opposed?

Mr. Apicella: Nay.

Dr. Ackermann: Nay.

Dr. Larson: Two nays? Okay. Motion carries 4-2.

SUSPENSION OF THE AGENDA

Dr. Larson: Okay ladies and gentlemen, in view of the late time I think I'm going to suspend the rest of the agenda. If nobody has any objections and we will deal with the rest of this next time.

Ms. Keith: That's fine.

ZONING ADMINISTRATOR'S REPORT

Ms. Keith: No report from the Zoning Administrator. Thank you.

ADJOURNMENT

Ms. Keith: Mr. Larson, are we adjourned?

Dr. Larson: Yes. We're adjourned.

With no further business to discuss, the meeting was adjourned at 10:58 p.m.